# Judicial Council Task Force on Jury Instructions
# Appointed by the Honorable Chief Justice Ronald M. George

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## Preface

*Introduction*

The California Judicial Council Task Force on Jury Instructions has been charged by Chief Justice Ronald George with writing "jury instructions that both accurately state the law and are more easily understandable to jurors."[i] The draft instructions that follow are a representative sample of a much larger set of instructions already drafted by the Task Force Subcommittee on Civil Instructions. The Subcommittee hopes that release of this limited subset now will stimulate public critique and enable the drafters to refine both the particular instructions and the more global choices about format and approach as the drafting effort continues.

The Task Force has based the instructions on a de novo review of relevant decisional precedent and statutory materials because a license to use the copyrighted BAJI materials was not available. These materials are circulated under the Copyright of the California Judicial Council. They have not yet been officially approved for use.

*Background: Creation of the Task Force*

In December of 1995, the Judicial Council established a Blue Ribbon Commission on Jury System Improvement. The Commission's mission was to "conduct a comprehensive evaluation of the jury system and [make] timely recommendations for improvement."[ii] After extensive study, the commission made a number of recommendations to the Chief Justice and the Judicial Council, one of which was that the Council create a Task Force on Jury Instructions to draft more understandable instructions. The recommendation stemmed from the Commission's conclusion that "jury instructions are presently given in California and elsewhere are, on occasion, simply impenetrable to the ordinary juror."[iii]

In light of the Commission's view that jurors could be accurately instructed on the law in language more easily absorbed and understood, the Judicial Council acted on the recommendation, creating the current Task Force. The Chief Justice noted the two principal goals underlying the creation of more intelligible instructions are "1) making juror's experiences more meaningful and rewarding and 2) providing clear instructions that will improve the quality of justice by insuring that jurors understand and apply the law correctly in their deliberations."[iv]

*Purpose of this Release for Comment*

The Chief Justice encouraged the Task Force to solicit broad input from those representing a wide rage of views and experience. In response, the drafters seek public commentary at this intermediate point in the process. Commentary at this stage can inform both revisions of existing drafts and choices for the remaining instructions. We have a released a small but representative sample rather than a much larger number of completed drafts to facilitate input on an expedited basis. The Task Force is interested in reactions to style, format, legal accuracy, clarity, and usefulness of accompanying bench notes and commentary. The Task Force is not a law revision commission. Our goal is to produce instructions that accurately explain the existing law in a manner the average juror can readily understand and that the trial bench and bar will find helpful. We appreciate your willingness to assist in this effort.

## Drafting Policies

The members of the task force carefully considered, and sometimes extensively debated, many issues about how the instructions should be drafted. The decisions of the task force on the most significant of those issues are discussed and explained below.

### *Drafting Guidelines*

The task force reviewed the literature addressing jury instructions and considered the recommendations for improving instructional clarity and comprehensibility. (See, e.g., Lind and Partridge, Federal Judicial Center, Pattern Criminal Jury Instructions (1987), Appendix A, *Suggestions for Improving Juror Understanding of Instructions*; Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 Cal.L.Rev. 731 (1981); Charrow and Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Columbia L.Rev. 1306 (1979); and Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L.Rev. 37 (1993).) When drafting the instructions, we applied many of the specific techniques suggested by the literature, including the following:

- Avoid using nominalizations.
- Use "modal" verbs (must, should, may) to clarify the jury's task.
- Avoid redundancy or unnecessary words.
- Use the active voice.
- Use short sentences.
- Keep the subject close to the verb; move interrupting phrases to the beginning or end of the sentence.
- Avoid omitting relative pronouns and auxiliary verbs.
- Avoid double negatives.
- Be concrete rather than abstract.
- Avoid instructing the jurors about things they do not need to know.
- Adopt a structure that is logical and easy to follow.

In addition to these general principles, the task force adopted the following specific guidelines.

### *References to the parties*

The task force chose to refer to the parties by name whenever possible, allowing users to insert the parties' names in the text of the instructions. It was felt this would make the instructions less abstract to the jury than if the parties were designated as "plaintiff" and "defendant." At some point in the future, the instructions will undoubtedly be available in

an electronic format and the substitution of names or other specific words within the instructions will be possible with a simple keystroke.

### *Burden of Proof*

The task force decided to include the allocation of the burden of proof within the instructions themselves, as appropriate. It was felt that this would give the jurors a better understanding of how the law relates to their decision-making process.

### *Tone*

The task force's mandate is to produce instructions that are accurate and comprehensible to jurors. In setting a tone, the task force attempted to balance the need for clarity of language and 'plain English' choices with the formality necessary given the importance of the instructions.

### *Notes*

In some instructions, the first item to appear in the notes following each instruction (under "Directions for Use") is a statement indicating how the instruction should be used. We concluded that this information would be useful to judges and practitioners and would also help avoid instructional error.

The next section ("Sources and Authority") describes the authority relied on for the instructional language and other definitions. We have also occasionally included a "Commentary" section where specific drafting choices are explained, or other issues are addressed by the task force.

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[i] *Videotape,* Address of Chief Justice Ronald George to Task Force on Jury Instructions (Judicial Council of California, Administrative Office of the Courts 2/18/97).
[ii] Final Report of the Blue Ribbon Commission on Jury System Improvement (Judicial Council of California, Administrative Office of the Courts 5/6/1996) p.1.
[iii] *Id.* at p. 93
[iv] See, *supra*, note 1.

## 100
## Preliminary Admonitions

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**You have now been sworn as jurors in this case. I want to impress upon you the seriousness and importance of serving on a jury. Trial by jury is a fundamental right in California. That is, if the parties in a suit want a jury trial, they have a right to it. They have a right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a fair verdict based on the evidence presented. [Judge may wish to thank jurors.] Before we begin, I need to explain how you must conduct yourselves during the trial.**

**Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including your family and friends. You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.**

**During the trial you must not listen to anyone else talk about the case or the people involved in the case. You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case. If anyone tries to talk to you about this case, tell that person that you cannot discuss it because you are a juror. If he or she keeps talking to you, simply walk away and report the incident to me as soon as you can.**

**After the trial is over and I have released you from jury duty, you may discuss the case with anyone.**

**During the trial, do not read, listen to, or watch any news reports about this case. You must decide this case based only on the evidence presented in this trial. Nothing presented outside this courtroom is evidence unless I specifically tell you it is. The attorneys cannot question a reporter to determine if a report is based on fact, rumor, or opinion. For that reason, news reports, talk shows, and editorials are not evidence.**

**Do not do any research on your own or as a group. Do not use dictionaries or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as the family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. If you do need to view the scene during the trial, you will be taken there as a group under my supervision.**

**It is important that you keep an open mind throughout this trial. Evidence can only be presented a piece at a time. Do not form or express an opinion about this case while the trial is going on. You must not decide on a verdict until after you have heard all the evidence and have discussed it thoroughly with your fellow jurors in your deliberations.**

**When it is time to begin your deliberations, you will meet in the jury room. You may discuss the case only in the jury room and only when all the jurors are present.**

**Do not let bias, sympathy, prejudice, or public opinion influence your verdict.**

**You, and only you, must decide what the facts are in this case. And, I repeat, your verdict must be based only upon the evidence that you hear or see in this courtroom.**

**At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you, even if you do not agree with the law.**

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## DIRECTIONS FOR USE

This instruction should be given at the outset of every case.

If the jury is allowed to separate, Code of Civil Procedure section 611 requires the judge to admonish the jury that "it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them."

## SOURCES AND AUTHORITY

- Article I, section 16 of the California Constitution provides that "trial by jury is an inviolate right and shall be secured to all."

- Code of Civil Procedure section 608 provides, in part: "In charging the jury the Court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact." (See also Evid. Code, § 312; Code Civ. Proc., § 592.)

- Under Code of Civil Procedure section 611, jurors may not "form or express an opinion" prior to deliberations. (See also *City of Pleasant Hill v. First Baptist Church of Pleasant Hill* (1969) 1 Cal.App.3d 384, 429.) It is misconduct for a juror to prejudge the case. (*Deward v. Clough* (1966) 245 Cal.App.2d 439, 444.)

- Jurors must not undertake independent investigations of the facts in a case. (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 36; *Walter v. Ayvazian* (1933) 134 Cal.App. 360, 365.)

- Jurors are required to avoid discussions with parties, counsel, or witnesses. (*Wright v. Eastlick* (1899) 125 Cal. 517; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 144.)

- It is misconduct for jurors to engage in experiments that produce new evidence. (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1746.)

- Unauthorized visits to the scene of matters involved in the case are improper. (*Anderson v. Pacific Gas & Electric Co.* (1963) 218 Cal.App.2d 276, 280.)

- It is improper for jurors to receive information from the news media about the case. (*Province v. Center for Women's Health and Family Birth* (1993) 20 Cal.App.4th 1673, 1679, disapproved on other grounds in *Heller v. Norcal Mutual Insurance* (1994) 8 Cal.4th 30, 41; *Hilliard v. A. H. Robbins Co.* (1983) 148 Cal.App.3d 374, 408.)

- Jurors must avoid bias: " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution.' [Citations.] " (*Weathers v. Kaiser Foundation Hospitals* (1971) 5

Cal.3d 98, 110.) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid*.)

- An instruction to disregard any appearance of bias on the part of the judge is proper and may cure any error in a judge's comments. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259, disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478.) "It is well understood by most trial judges that it is of the utmost importance that the trial judge not communicate in any manner to the jury the judge's opinions on the case submitted to the jury, because juries tend to attach inflated importance to any such communication, even when the judge has no intention whatever of influencing a jury's determination." (*Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 Cal.App.3d 302, 307.)

## 101
## Overview of Trial

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**To assist you in your tasks as jurors, I will now explain how the trial will proceed. [Name of plaintiff] filed this lawsuit. [He/She] is called a plaintiff. [He/She] seeks damages [or other relief] from [name of defendant], who is called a defendant. Each plaintiff and each defendant is called a party to the case.**

**First, each side may make an opening statement, but neither side is required to do so. An opening statement is not evidence. You cannot use it to make any decisions in this case. It is simply an outline to help you understand what that party expects the evidence will show.**

**Next, the jury will start hearing the evidence. The plaintiff will present [his/her] evidence first. When the plaintiff is finished, the defendant will have an opportunity to present [his/her] evidence.**

**Each witness will first be questioned by the side that asked the witness to testify. This is called direct examination. Then the other side is permitted to question the witness. This is called cross-examination.**

**When a document or an object is introduced into evidence, it is called an exhibit. Exhibits will be given a number and marked so they may be clearly identified. You will be able to look at them during your deliberations.**

**There are many rules that govern whether something will be considered evidence in the trial. As one side presents evidence, the other side has the right to object and to ask me to decide if the evidence is permitted by the rules. Usually, I will decide immediately, but sometimes I may have to hear arguments outside of your presence.**

**After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments. What the parties say in closing argument is not evidence. The arguments are offered to help you understand the evidence and how the law applies to it.**

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## DIRECTIONS FOR USE

This instruction is intended to provide a "road map" for the jurors. This instruction should be read in conjunction with instruction 100, *Preliminary Admonitions*.

Throughout these instructions, the names of the parties should be inserted as indicated. This instruction should be modified to reflect the number of plaintiffs and defendants involved in the suit.

## SOURCES AND AUTHORITY

- Code of Civil Procedure section 607 provides:

> When the jury has been sworn, the trial must proceed in the following order, unless the court, for special reasons otherwise directs:
>
> 1. The plaintiff may state the issue and his case;
> 2. The defendant may then state his defense, if he so wishes, or wait until after plaintiff has produced his evidence;
> 3. The plaintiff must then produce the evidence on his part;
> 4. The defendant may then open his defense, if he has not done so previously;
> 5. The defendant may then produce the evidence on his part;
> 6. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;
> 7. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument;
> 8. If several defendants having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;
> 9. The court may then charge the jury.

Secondary Sources

- 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 161, p. 189–190
- California Practice Guide: Civil Trials and Evidence, §§ 1:427–1:432; 4:460–4:463

## 102
## Non-Person Party

**A [corporation] [partnership] [city] [county] [other entity], [insert name of entity], is a party in this lawsuit. [Name of entity] is entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.**

**When I use words like "person" or "he" or "she" in these instructions to refer to a party, those instructions also apply to [name of entity].**

### DIRECTIONS FOR USE

This instruction should be given as an introductory instruction if one of the parties is an entity. Select the type of entity and insert the name of the entity where indicated in the instruction.

### SOURCES AND AUTHORITY

- Corporations Code section 207 provides that a corporation "shall have all of the powers of a natural person in carrying out its business activities." Civil Code section 14 defines the word "person," for purposes of that code, to include corporations as well as natural persons.

- As a general rule, a corporation is considered to be a legal entity that has an existence separate from that of its shareholders. (*Erkenbrecher v. Grant* (1921) 187 Cal. 7, 9.)

- "In general, any person or entity has capacity to sue or defend a civil action in the California courts. This includes artificial 'persons' such as corporations, partnerships and associations." (*American Alternative Energy Partners II, 1985 v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 559 (internal citations omitted).)

Secondary Sources

- 9 Witkin, Summary of Cal.Law (9th ed. 1989) Corporations, § 1, p. 511

## 103
## Insurance

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**You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only upon the law and the evidence.**

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### SOURCES AND AUTHORITY

- Evidence Code section 1155 provides: "Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing."

- As a rule, evidence that the defendant has insurance is both irrelevant and prejudicial to the defendant. (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469.)

- Generally, evidence that the plaintiff was insured is not admissible under the "collateral source rule." (*Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16–18; *Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 25–26.)

- Evidence of insurance coverage may be admissible where it is coupled with other relevant evidence, provided that the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance. (*Blake v. E. Thompson Petroleum Repair Co., Inc.* (1985) 170 Cal.App.3d 823, 831.)

- An instruction to disregard whether a party has insurance may, in some cases, cure the effect of counsel's improper reference to insurance. (*Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 814.)

Secondary Sources

- 1 Witkin, Cal. Evidence (3th ed. 1986) § 417, p. 390
- 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, §§ 230–233
- Jefferson, California Evidence Benchbook (3rd ed. 1977) §§ 34.32–34.36
- California Practice Guide: Civil Trials and Evidence, § 5:371

## 104
## Evidence

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**Evidence is sworn testimony, documents, or anything else admitted into evidence. You must decide what the facts are in this case from the evidence you see or hear during the trial. You may not consider as evidence anything that you see or hear when court is not in session, even something done or said by one of the parties, attorneys, or witnesses.**

**What the attorneys say during the trial is not evidence.**

**(1) In their opening statements and closing arguments, the attorneys will talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.**

**(2) The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggests that it is true.**

**However, the attorneys for both sides can agree that certain facts are true. This agreement is called a stipulation. If I accept their agreement, no other proof is needed. You must accept those facts as true in this trial.**

**Each side has the right to object to evidence offered by the other side. If I do not agree with the objection, I will say it is overruled. If I overrule an objection, the witness will answer and you may consider the evidence. If I agree with the objection, I will say it is sustained. If I sustain an objection, you must ignore the question. If the witness did not answer, you must not guess what he or she might have said or why I sustained the objection. If the witness has already answered, you must ignore the answer.**

**Sometimes you may hear testimony that should not have been presented to you. An attorney may make a motion to strike that testimony. If I grant the motion, you must totally disregard that testimony. You must treat it as though it did not exist.**

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## DIRECTIONS FOR USE

This instruction should be given as an introductory instruction.

## SOURCES AND AUTHORITY

- Evidence Code section 140 defines "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

- Evidence Code section 312 provides:

  > Except as otherwise provided by law, where the trial is by jury:
  > (a) All questions of fact are to be decided by the jury.
  > (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Evidence Code section 353 provides:

  > A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed by reason of the erroneous admission of evidence unless:
  > (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
  > (b) The court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice.

- A stipulation in proper form is binding on the parties if it is within the authority of the attorney. Properly stipulated facts may not be contradicted. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142.)

- Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960.)

- Courts have stated that "[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished." (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427; *Horn v. Atchison, Topeka & Santa Fe Ry. Co*. (1964) 61 Cal.2d 602, 610.)

Secondary Sources

- 3 Witkin, Cal. Evidence (3rd ed. 1986) Ch. XI, Introduction of Evidence at Trial

## 105
## Witnesses

**A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.**

**In deciding whether to believe a witness's testimony, you may consider these questions:**

**(1) How well did the witness see, hear, or otherwise sense the things that he or she described in court?**

**(2) How well did the witness remember and describe what happened?**

**(3) How did the witness look, act, and speak while testifying?**

**(4) Did the witness have any reason to lie? Did the witness show any bias or prejudice? Did the witness have a personal relationship with any of the parties involved in the case? Does the witness have a personal stake in how this case is decided?**

**(5) What was the witness's attitude toward this case or about giving testimony?**

**Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.**

**However, if you decide that a witness has deliberately lied about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness lied about some things but told the truth about others, you may accept the part you think is true and ignore the rest.**

**Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.**

**You must not be biased against any witness because of his or her race, sex, religion, occupation, or national origin [or {insert any other impermissible form of bias}.].**

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## DIRECTIONS FOR USE

This instruction should be given as an introductory instruction.

## SOURCES AND AUTHORITY

- Evidence Code section 312 provides:

  Except as otherwise provided by law, where the trial is by jury:
  (a) All questions of fact are to be decided by the jury.
  (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:

  Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

  (a) His demeanor while testifying and the manner in which he testifies.
  (b) The character of his testimony.
  (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
  (d) The extent of his opportunity to perceive any matter about which he testifies.
  (e) His character for honesty or veracity or their opposites.
  (f) The existence or nonexistence of a bias, interest, or other motive.

(g) A statement previously made by him that is consistent with his testimony at the hearing.
(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
(i) The existence or nonexistence of any fact testified to by him.
(j) His attitude toward the action in which he testifies or toward the giving of testimony.
(k) His admission of untruthfulness.

- Evidence Code section 411 provides that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact." According to former Code of Civil Procedure section 2061, the jury should be instructed that "they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds."

- The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: "It should certainly not be deemed of vital importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671.)

## 1900
## Duties of the Judge and Jury

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**Members of the jury, you have now heard all the evidence [and the closing arguments of the attorneys]. [The attorneys will have one last chance to talk to you in closing argument. But before they do, it] [It] is my duty to instruct you on the law that applies to this case. You will have a copy of my instructions with you when you go to the jury room to deliberate.**

**You, and only you, must decide what the facts are. You must consider all the evidence and then decide what you think really happened. You must decide the facts based on the evidence that you have been given in this courtroom.**

**You must not let bias, sympathy, prejudice, or public opinion influence your decision.**

**I will now tell you the law that you must follow to reach your verdict. You must follow the law exactly as I give it to you, even if you disagree with it. If the attorneys have said anything different about what the law means, you must follow what I say.**

**In reaching your verdict, do not guess what I think your verdict should be from something I may have said or done.**

**Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.**

**After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.**

**If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others are. In addition, the order of the instructions does not make any difference.**

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## DIRECTIONS FOR USE

As indicated by the brackets in the first paragraph, this instruction can be read either before or after closing arguments.

## SOURCES AND AUTHORITY

- Code of Civil Procedure section 608 provides that "[i]n charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict." It also provides that the court "must inform the jury that they are the exclusive judges of all questions of fact." (See also Code Civ. Proc., § 592.)

- Evidence Code section 312 (a) provides that "[e]xcept as otherwise provided by law, where the trial is by jury [a]ll questions of fact are to be decided by the jury."

- An instruction to disregard any appearance of bias on the part of the judge is proper. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259, disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478.)

- Jurors must avoid bias: " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution.' [Citations.] " (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110.) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid.*)

- An instruction to consider all the instructions together can help avoid instructional errors of conflict, omission, and undue emphasis. (*Escamilla v. Marshburn Brothers* (1975) 48 Cal.App.3d 472, 484.)

- Providing an instruction stating that, depending on what the jury finds to be the facts, some of the instructions may not apply can help avoid reversal on the grounds of misleading jury instructions. (See *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 629–630.)

- In *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57–59, the Supreme Court held that the giving of cautionary instructions stating that no undue emphasis was intended by repetition and that the judge did not intend to imply how any issue should be decided should be considered in weighing the net effect of the instructions on the jury.

## 1901
## Predeliberation Instructions

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**When you go to the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are orderly and that everyone has a fair chance to be heard.**

**It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Try to reach an agreement. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. But do not give up your honest beliefs only because the others think differently.**

**Please do not state your opinions too strongly at the beginning of your deliberations. Also, do not immediately announce how you plan to vote. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.**

**You should use your common sense, but do not use or consider any special training or unique personal experience that any of you have in matters involved in this case. Such training or experience is not a part of the evidence received in this case.**

**Sometimes jurors disagree or have questions about what the witnesses said in their testimony. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the clerk or bailiff. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.**

**At least nine jurors must agree on each verdict and on each question that you are asked to answer. However, the same jurors do not have to agree on each verdict or each question. Any nine jurors are sufficient. As soon as you have agreed upon a verdict and answered all the questions as instructed, the foreperson must date and sign the form(s) and notify the clerk or the bailiff.**

**Your decision must be based on your personal evaluation of the evidence presented in the case, not on chance. You must not base your decision on a guess or on a flip of a coin. If you decide to award damages, you must not simply add up the amounts each juror thinks is right and then make the average your verdict.**

**You may take breaks, but do not resume your discussions until all of you are back in the jury room.**

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## DIRECTIONS FOR USE

This instruction should be given after the instructions on the substantive law and immediately before the jury retires to deliberate.

## SOURCES AND AUTHORITY

- Code of Civil Procedure section 613 provides, in part: "When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if the retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court."

- Code of Civil Procedure section 614 provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel."

- Code of Civil Procedure section 618 and article I, section 16, of the California Constitution provide that three-fourths of the jurors must agree to a verdict in a civil case.

- The prohibition on chance or quotient verdict is stated in Code of Civil Procedure section 657, which provides that a verdict may be vacated and a new trial ordered "whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance." (See also *Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064–1065.)

- Jurors should be encouraged to deliberate on the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911.)

- The jurors may properly be advised of the duty to hear and consider each other's arguments with open minds, rather than preventing agreement by stubbornly sticking to their first impressions. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594.)

## 200
## Obligation to Prove—More Likely True Than Not True

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**When I tell you that a party must prove a fact, I mean that the party must persuade you, by the evidence presented in court, that the fact is more likely to be true than not true. You should consider all the evidence that applies to that fact, no matter which party produced the evidence.**

**After weighing all of the evidence, if you cannot decide whether a fact is more likely to be true than not true, you must conclude that the party did not prove that fact.**

**In criminal trials, the prosecution must prove facts showing that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove a fact need only prove that the fact is more likely to be true than not true.**

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### DIRECTIONS FOR USE

Evidence Code section 502 requires the court to instruct the jury regarding which party bears the burden of proof on each issue and the requisite degree of proof.

For an instruction on clear and convincing evidence, see instruction 201, *More Likely True—Clear and Convincing Proof.*

### SOURCES AND AUTHORITY

- Evidence Code section 115 provides: " 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. [¶] Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

- Evidence Code section 500 provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

- Each party is entitled to the benefit of all the evidence, including the evidence produced by an adversary. (*Willams v. Barnett* (1955) 135 Cal.App.2d 607, 612; 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 305, p. 351.)

- The general rule in California is that " '[i]ssues of fact in civil cases are determined by a preponderance of testimony.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 483 (citation omitted).)

- The preponderance-of-the-evidence standard "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.' " (*In re Angelia P.* (1981) 28 Cal.3d 908, 918 (citation omitted).)

- "Preponderance of the evidence" " 'means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed.' " (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325 (quoting *People v. Miller* (1916) 171 Cal. 649, 652, and holding that it was prejudicial misconduct for jurors to refer to the dictionary for definition of the word "preponderance".)

Secondary Sources

- Jefferson, California Evidence Benchbook (3rd ed. 1977) ch. 45
- 1 Witkin, Cal. Evidence (3rd ed. 1986) § 157, p. 135

## 201
## More Likely True—Clear and Convincing Proof

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**In this case, there are some specific facts that must be proved by the higher standard of clear and convincing evidence. This means the party must persuade you that it is highly probable that the fact is true.**

**I will tell you specifically which of the facts must be proved by clear and convincing evidence. All the other facts will be proved if they are more likely to be true than not true.**

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### DIRECTIONS FOR USE

Evidence Code section 502 requires the court to instruct the jury regarding which party bears the burden of proof on each issue and the requisite degree of proof.

This instruction should be read immediately after instruction 200, *Obligation to Prove—More Likely True Than Not True*, if the jury will have to decide an issue by means of the clear-and-convincing evidence standard.

### SOURCES AND AUTHORITY

- Evidence Code section 115 provides: " 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. [¶] Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

- Evidence Code section 500 provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

- Each party is entitled to the benefit of all the evidence, including the evidence produced by an adversary. (*Willams v. Barnett* (1955) 135 Cal.App.2d 607, 612; 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 305, p. 351.)

- "Proof by clear and convincing evidence is required 'where particularly important individual interests or rights are at stake,' such as the termination of parental rights, involuntary commitment, and deportation. However, 'imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 483 (quoting *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389–390).)

- " 'Clear and convincing' evidence requires a finding of high probability." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.)

Secondary Sources

- Jefferson, California Evidence Benchbook (3rd ed. 1977) §§ 45.4, 45.21
- 1 Witkin, Cal. Evidence (3rd ed. 1986) §§ 160, 161

## 202
## Direct and Indirect Evidence

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**Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion. There is really no end to the forms that evidence can take.**

**Some evidence proves a fact directly, such as testimony of a witness who saw a jet plane flying across the sky. Some evidence proves a fact indirectly, such as testimony of a witness who saw only the white trail that jet planes often leave. Each witness's testimony is evidence that a jet plane flew across the sky.**

**As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves.**

---

### DIRECTIONS FOR USE

An instruction concerning the effect of circumstantial evidence must be given on request when it is called for by the evidence. (*Shepherd v. Walley* (1972) 28 Cal.App.3d 1079, 1084; *Calandri v. Ione Unified School Dist.* (1963) 219 Cal.App.2d 542, 551; *Trapani v. Holzer* (1958) 158 Cal.App.2d 1, 6.)

### SOURCES AND AUTHORITY

- Evidence Code section 410 provides: "As used in this chapter, 'direct evidence' means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact."

- Evidence Code section 600(b) provides: "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."

- The Assembly Committee on Judiciary Comment to section 600 observes: "Under the Evidence Code, an inference is not itself evidence; it is the result of reasoning from evidence."

- "[T]he fact that evidence is 'circumstantial' does not mean that it cannot be 'substantial.' Relevant circumstantial evidence is admissible in California. Moreover, the jury is entitled to accept persuasive circumstantial evidence even where contradicted by direct testimony." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548, overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548.)

Secondary Sources

- Jefferson, California Evidence Benchbook (3rd ed. 1977) §§ 19.12–19.18
- 1 Witkin, Cal. Evidence (3rd ed. 1986) §§ 284, 285, 1795–1798

## COMMENTARY

Outside of the legal profession, the word "indirect" appears to be more commonly used than the word "circumstantial." "The terms 'indirect evidence' and 'circumstantial evidence' are interchangeable and synonymous." (*People v. Yokum* (1956) 145 Cal.App.2d 245, 250; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152.)

## 203
## Party Having Power to Produce Better Evidence

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**You may consider the ability of each party to provide evidence. If a party provided weak evidence when it could have provided stronger evidence, you may distrust the weak evidence.**

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### DIRECTIONS FOR USE

An instruction on failure to produce evidence should not be given if there is no evidence that the party producing inferior evidence had the power to produce superior evidence. (*Thomas v. Gates* (1899) 126 Cal. 1, 6; *Hansen v. Warco Steel Corp.* (1965) 237 Cal.App.2d 870, 876; *Holland v. Kerr* (1953) 116 Cal.App.2d 31, 37.)

The reference to "stronger evidence" applies to evidence that is admissible. This instruction should not be construed to apply to evidence that the court has ruled inadmissible. (*Hansen, supra,* 237 Cal.App.2d at p. 877.)

For willful suppression of evidence see instruction 204, *Willful Suppression of Evidence.*

### SOURCES AND AUTHORITY

- Evidence Code section 412 provides: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

- Section 412 does not incorporate the "best evidence rule," but instead deals with "stronger and more satisfactory evidence." (*Largey v. Intrastate Radiotelephone, Inc.* (1982) 136 Cal.App.3d 660, 672 [giving of instruction was proper because corporate records concerning date of meeting could have been stronger evidence than recollection of participants several years later].)

Secondary Sources

- 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 313, p. 358
- This inference was a mandatory presumption under former Code of Civil Procedure section 1963(6),. It is now considered a permissible inference. (See 3 Witkin, Cal. Evidence (3rd ed. 1986) § 1774, p. 1726.)

## COMMENTARY

The instruction uses "may distrust" instead of "should distrust" because the phrase "should be viewed with distrust" in section 412 is weaker than "should distrust."

## 204
## Willful Suppression of Evidence

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**You may consider whether one party intentionally prevented the other side from having access to evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party.**

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### DIRECTIONS FOR USE

This instruction should be given only if there is evidence of suppression. (*In re Estate of Moore* (1919) 180 Cal. 570, 585; *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1051; *County of Contra Costa v. Nulty* (1965) 237 Cal.App.2d 593, 598.)

In *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12, a case concerning the tort of intentional spoliation of evidence, the Supreme Court observed that trial courts are free to adapt standard jury instructions on willful suppression to fit the circumstances of the case, "including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation."

### SOURCES AND AUTHORITY

- Evidence Code section 413 provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

- Former Code of Civil Procedure section 1963 (5) permitted the jury to infer "[t]hat the evidence willfully suppressed would be adverse if produced." Including this inference in a jury instruction on willful suppression is proper because "Evidence Code section 413 was not intended as a change in the law." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 994, disapproved of on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664.)

- "A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of the fact will infer, and properly so, that the evidence, had it been

produced, would have been adverse." (*Breland v. Traylor Engineering and Manufacturing Co.* (1942) 52 Cal.App.2d 415, 426.)

Secondary Sources

- 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 313, p. 358
- 3 Witkin, Cal. Evidence (3th ed. 1986) § 1775, p. 1727

## 205
## Failure to Explain or Deny Evidence

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**You may consider whether a party failed to explain or deny some unfavorable evidence. Failure to explain or to deny unfavorable evidence may suggest that the evidence is true.**

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### DIRECTIONS FOR USE

This instruction should be given only if there is a failure to deny or explain a fact that is material to the case.

### SOURCES AND AUTHORITY

- Evidence Code section 413 provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

### COMMENTARY

Few civil cases discuss this type of instruction. However, several criminal cases hold jurors may be instructed that the failure to explain or deny adverse evidence does not suggest guilt but does suggest that the evidence may be true, and that this failure may more likely lead to inferences unfavorable to the other side. (*People v. Saddler* (1979) 24 Cal.3d 671.)

## 206
## Evidence Admitted for Limited Purpose

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**During the trial, I explained to you that certain evidence was admitted for a limited purpose. You may consider that evidence only for the limited purpose that I described. You may not consider that evidence for any other purpose.**

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### DIRECTIONS FOR USE

Where appropriate, an instruction limiting the purpose for which evidence is to be considered must be given upon request. (Evid. Code, § 355; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 Cal.2d 655, 665–66; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 341.) It is recommended that the judge call attention to the purpose to which the evidence applies.

For instruction on evidence applicable to one party or a limited number of parties, see instruction 207, *Evidence Applicable to One Party*.

### SOURCES AND AUTHORITY

- Evidence Code section 355 provides: "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."

- Refusal to give a requested instruction limiting the purpose for which evidence is to be considered may constitute error. (*Adkins v. Brett* (1920) 184 Cal. 252, 261–262.)

- Courts have observed that "[w]here the information is admitted for a purpose other than showing the truth of the matter asserted … , prejudice is likely to be minimal and a limiting instruction under section 355 may be requested to control the jury's use of the information." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1525.)

- An adverse party may be excused from the requirement of requesting a limiting instruction and may be permitted to assert error if the trial court unequivocally rejects

the argument upon which a limiting instruction would be based. (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 298–299.)

Secondary Sources

- 1 Witkin, Cal. Evidence (3rd ed. 1986) §§ 313–317
- Jefferson, California Evidence Benchbook (3rd ed. 1977) §§ 20.11–20.13

## 207
## Evidence Applicable to One Party

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**During the trial, I explained that certain evidence applied to only one party. You may not apply that evidence to any other party.**

**[During the trial, I explained that certain evidence applied to one or more parties but not to every party. You may not apply that evidence to any other party.]**

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### DIRECTIONS FOR USE

Where appropriate, an instruction limiting the parties to whom evidence applies must be given upon request. (Evid. Code, § 355.) It is recommended that the judge call attention to the party or parties to which the evidence applies.

For instruction on evidence admissible for a limited purpose, see instruction 206, *Evidence Admitted for Limited Purpose*.

### SOURCES AND AUTHORITY

- Evidence Code section 355 provides: "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."

Secondary Sources

- 1 Witkin, Cal. Evidence (3rd ed. 1986) §§ 313–317
- Jefferson, California Evidence Benchbook (3rd ed. 1977) §§ 20.11–20.13

## 208
## Deposition as Substantive Evidence

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**During the trial, you heard testimony read from a deposition. A deposition is the testimony of a person taken before trial. At a deposition the person is sworn to tell the truth and is questioned by the attorneys. You must consider the deposition testimony that was read to you the same as testimony given in court.**

---

### SOURCES AND AUTHORITY

- Code of Civil Procedure section 2002 provides:

  > The testimony of witnesses is taken in three modes:
  > 1. By affidavit;
  > 2. By deposition;
  > 3. By oral examination.

- Code of Civil Procedure section 2025(u) provides, in part: "At the trial … any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition … so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the following [rules set forth in this subdivision]."

- "Admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact." (*Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380.)

Hearsay Exception for Former Testimony

- Evidence Code section 1291(a) provides:

  > Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or
(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

- Evidence Code section 1292, subdivision (a), provides:

  Evidence of former testimony is not made inadmissible by the hearsay rule if:
  (1) The declarant is unavailable as a witness;
  (2) The former testimony is offered in a civil action; and
  (3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

- Evidence Code section 1290(c) defines "former testimony" as "[a] deposition taken in compliance with law in another action."

- "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds the witness unavailable as a witness within the meaning of section 240 of the Evidence Code." (*Chavez v. Zapata Ocean Resources, Inc.* (1984) 155 Cal.App.3d 115, 118 (citation omitted).)

Secondary Sources

- 3 Witkin, Cal. Evidence (3rd ed. 1986) §§ 1809–1817
- 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 304, p. 351

## 209
## Use of Interrogatories of a Party

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**Before trial, each party has the right to ask the other parties to answer written questions. These questions are called interrogatories. The answers are also in writing and are given under oath. You must consider the questions and answers that were read to you the same as testimony given in court.**

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### SOURCES AND AUTHORITY

- Code of Civil Procedure section 2030(n) provides: "At the trial or any other hearing in the action, so far as admissible under the rules of evidence, the propounding party or any party other than the responding party may use any answer or part of an answer to an interrogatory only against the responding party. It is not ground for objection to the use of an answer to an interrogatory that the responding party is available to testify, has testified, or will testify at the trial or other hearing."

- "Admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact." (*Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380.)

Secondary Sources

- 3 Witkin, Cal. Evidence (3rd ed. 1986) § 1818, p. 1778
- 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 304, p. 351

## 210
## Requests for Admissions

---

**Before trial, each party has the right to ask another party to admit in writing that certain facts are true. If the other party admits that those facts are true, you must accept them as true. No further evidence is required to prove them.**

**[However, these facts must be considered true only as they apply to the party who admitted they were true.]**

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### DIRECTIONS FOR USE

The bracketed phrase should be given if there are multiple parties.

### SOURCES AND AUTHORITY

- Requests for admission are authorized by Code of Civil Procedure section 2033(a). Section 2033(n), provides, in part: "Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action. … However, any admission made by a party under this section is (1) binding only on that party, and (2) made for the purpose of the pending action only. It is not an admission by that party for any other purpose, and it shall not be used in any manner against that party in any other proceeding."

- "As Professor Hogan points out, '[t]he request for admission differs fundamentally from the other five discovery tools (depositions, interrogatories, inspection demands, medical examinations, and expert witness exchanges). These other devices have as their main thrust the uncovering of factual data that may be used in proving things at trial. The request for admission looks in the opposite direction. It is a device that seeks to eliminate the need for proof in certain areas of the case.' " (*Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1577 (quoting 1 Hogan, Modern California Discovery (4th ed. 1988) § 9.1, p. 533).)

- All parties to the action may rely on admissions. (See *Swedburg v. Christiana Community Builders* (1985) 175 Cal.App.3d 138, 143.)

Secondary Sources

- 2 Witkin, Cal. Evidence (3rd ed. 1986) §§ 1553–1559

## 211
## Prior Conviction of a Felony

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**You have heard that a witness in this trial has been convicted of a felony. You were told about the conviction only to help you decide if you should believe the witness. You must not consider it for any other purpose.**

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### SOURCES AND AUTHORITY

- Evidence Code section 788 provides for the circumstances under which evidence of a prior felony conviction may be used to attack a witness's credibility. This section is most often invoked in criminal cases, but it may be used in civil cases as well.

- The standards governing admissibility of prior convictions in civil cases are different from those in criminal proceedings. In *Robbins v. Wong* (1994) 27 Cal.App.4th 261, the court observed: "Given the significant distinctions between the rights enjoyed by criminal defendants and civil litigants, and the diminished level of prejudice attendant to felony impeachment in civil proceedings, it is not unreasonable to require different standards of admissibility in civil and criminal cases." (*Id*. at p. 273.)

  In *Robbins*, the court concluded that article I, section 28 (f) of the California Constitution, as well as any Supreme Court cases on this topic in the criminal arena, does not apply to civil cases. (*Robbins, supra,* 27 Cal.App.4th at p. 274.) However, the court did hold that the trial court "may utilize such decisions to formulate guidelines for the judicial weighing of probative value against prejudicial effect under section 352." (*Ibid*.)

Secondary Sources

- 3 Witkin, Cal. Evidence (3rd ed. 1986) §§ 1940–1944

## 212
## Statements of a Party Opponent

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**A party may offer into evidence any oral or written statement made by an opposing party outside the courtroom.**

**When you evaluate evidence of such a statement, you must consider these questions:**

**(1) Do you believe that the party actually made the statement? If you do not believe that the party made the statement, you may not consider the statement at all.**

**(2) If you believe that the statement was made, do you believe it was reported accurately?**

**You should view testimony about an oral statement of a party with caution.**

---

### DIRECTIONS FOR USE

Under Evidence Code section 403(c), the court must instruct the jury to disregard a statement offered as evidence if it finds that the preliminary facts do not exist. For adoptive admissions, see instruction 213, *Adoptive Admissions*.

### SOURCES AND AUTHORITY

- Evidence Code section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

  The Law Revision Commission comment to this section observes that "[t]he rational underlying this exception is that the party cannot object to the lack of the right to cross-examine the declarant since the party himself made the statement."

- There is no requirement that the prior statement of a party must have been against his or her interests when made in order to be admissible. Any prior statement of a party may be offered against him or her in trial. (1 Witkin, Cal. Evidence (3rd ed. 1986) § 640, p. 628.)

- Evidence Code section 403(a)(4) provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."

- The cautionary instruction regarding admissions is derived from common law, formerly codified at Code of Civil Procedure section 2061. The repeal of this section did not affect decisional law concerning the giving of the cautionary instruction. (*People v. Beagle* (1972) 6 Cal.3d 441, 455, fn. 4.)

- The purpose of the cautionary instruction has been stated as follows: "Ordinarily there is strong reasoning behind the principle that a party's extrajudicial admissions or declarations against interest should be viewed with caution. … No class of evidence is more subject to error or abuse inasmuch as witnesses having the best of motives are generally unable to state the exact language of an admission and are liable, by the omission or the changing of words, to convey a false impression of the language used." (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 214.)

- The need to give the cautionary instruction appears to apply to both civil and criminal cases. (See *People v. Livaditis* (1992) 2 Cal.4th 759, 789 (conc. opn. of Mosk, J.).)

Secondary Sources

- 1 Witkin, Cal. Evidence (3rd ed. 1986) §§ 637–640
- 3 Witkin, Cal. Evidence (3rd ed. 1986) § 1773, p. 1725
- Jefferson, California Evidence Benchbook (3rd ed. 1977) §§ 3.7–3.22

## 213
## Adoptive Admissions

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**You have heard evidence that [insert name of declarant] made the following statement: [insert description of statement]. You may consider that statement as evidence against [insert name of party against whom statement was offered], but only if you find that both of the following are true:**

1. **That [name of party against whom statement was offered] was aware of and understood the statement; and**

2. **That [name of party against whom statement was offered], by words or conduct, either**

    **(a) expressed [his/her] belief that the statement was true; or**

    **(b) implied that [he/she] agreed with the statement.**

**If you do not decide that these conditions are true, you must not consider the statement at all.**

---

### DIRECTIONS FOR USE

Under Evidence Code section 403(c), the court must instruct the jury to disregard the evidence of an adoptive admission if it finds that the preliminary facts do not exist.

For statements of a party opponent, see instruction 212, *Statements of a Party Opponent*. For admissions by silence, see instruction 214, *Admissions by Silence*. Evasive conduct falls under this instruction rather than instruction 212 or 214.

## SOURCES AND AUTHORITY

- Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

- Evidence Code section 403(a)(4) provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."

- The basis for the doctrine of adoptive admissions has been stated as follows: "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." (*In re Estate of Neilson* (1962) 57 Cal.2d 733, 746.)

- In order for the hearsay evidence to be admissible, "it must have been shown clearly that [the party] heard and understood the statement." (*Fisch v. Los Angeles Metropolitan Transit Authority* (1963) 219 Cal.App.2d 537, 540.) There must also be evidence of some type of reaction to the statement. (*Ibid*.) It is clear that the doctrine "does not apply if the party is in such physical or mental condition that a reply could not reasonably be expected from him." (*Southers v. Savage* (1961) 191 Cal.App.2d 100, 104.)

Secondary Sources

- 1 Witkin, Cal. Evidence (3rd ed. 1986) §§ 650–653
- Jefferson, California Evidence Benchbook (3rd ed. 1977) §§ 3.23–3.30

## 214
## Admissions by Silence

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**You have heard evidence that [insert name of declarant] made a statement in the presence of [insert name of party who remained silent] that [insert description of statement]. You have also heard that [insert name of party who remained silent] did not deny the statement.**

**You may treat the silence of [insert name of party who remained silent] as an admission that the statement was true if you believe all the following are true:**

1. **That [insert name of party who remained silent] was aware of and understood the statement;**

2. **That [he/she], by either words or actions, could have denied the statement but [he/she] did not; and**

3. **That [he/she] would have denied the statement if [he/she] thought it was false. In determining this, you may consider whether, under the circumstances, a reasonable person would have denied the statement if he or she thought it was false.**

**If you do not decide that all three of these conditions are true, you must not consider [insert name of party who remained silent]'s silence as an admission.**

---

### DIRECTIONS FOR USE

The jury should be instructed on the doctrine of adoptive admission by silence if the evidence giving rise to the doctrine is conflicting. (See *Southers v. Savage* (1961) 191 Cal.App.2d 100, 104–105.)

Under Evidence Code section 403(c), the court must instruct the jury to disregard the evidence if it finds that the preliminary facts do not exist.

For statements of a party opponent, see instruction 212, *Statements of a Party Opponent*. For admissions by words or evasive conduct, see instruction 213, *Adoptive Admissions*.

## SOURCES AND AUTHORITY

- Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

- Evidence Code section 403(a)(4) provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."

- The basis for the doctrine of adoptive admissions has been stated as follows: "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." (*In re Estate of Neilson* (1962) 57 Cal.2d 733, 746.)

- This instruction addresses adoption of an admission by silence. Adoption occurs "where declarations of third persons made in the presence of a party give rise to admissions, the conduct of the party in the face of the declaration constituting the adoption of the statement to form an admission." (*In re Estate of Gaines* (1940) 15 Cal.2d 255, 262.)

- "The basis of the rule on admissions made in response to accusations, is the fact that human experience has shown that generally it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing." (*Keller v. Key System Transit Lines* (1954) 129 Cal.App.2d 593, 596.) If the statement is not accusatory, then the failure to respond is not an admission. (*Neilson, supra,* 57 Cal.2d at p. 746; *Gilbert v. City of Los Angeles* (1967) 249 Cal.App.2d 1006, 1008.)

- Admissibility of this evidence depends upon whether (1) the statement was made under circumstances that call for a reply, (2) whether the party understood the

statement, and (3) whether it could be inferred from his conduct that he adopted the statement as an admission. (*Gilbert, supra,* 249 Cal.App.2d at p. 1009.)

- In order for the hearsay evidence to be admissible, "it must have been shown clearly that [the party] heard and understood the statement." (*Fisch v. Los Angeles Metropolitan Transit Authority* (1963) 219 Cal.App.2d 537, 540.) There must also be evidence of some type of reaction to the statement. (*Ibid*.) It is clear that the doctrine "does not apply if the party is in such physical or mental condition that a reply could not reasonably be expected from him." (*Souther, supra,* 191 Cal.App.2d at p. 104.)

Secondary Sources

- 1 Witkin, Cal. Evidence (3rd ed. 1986) §§ 650–653
- Jefferson, California Evidence Benchbook (3rd ed. 1977) §§ 3.23–3.30

## 215
## Exercise of a Communication Privilege

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**People have a legal right not to disclose what they told their [doctor/ attorney, etc.] because the law considers this information confidential. People may exercise this right freely and without fear of penalty.**

**You must not use the fact that a witness withheld confidential information to decide whether [he/she] should be believed. Indeed, you must not let it affect any of your decisions in this case.**

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### DIRECTIONS FOR USE

This instruction must be given upon request, where appropriate. (Evid. Code, § 913(b).)

The parties may wish to draft an instruction on invocation of the privilege against self-incrimination if that privilege is asserted.

### SOURCES AND AUTHORITY

- Evidence Code section 913(b), provides: "The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding."

- The comment to Evidence Code section 913 notes that this statute "may modify existing California law as it applies in civil cases." Specifically, the comment notes that section 913 in effect overrules two Supreme Court cases: *Nelson v. Southern Pacific Co.* (1937) 8 Cal.2d 648 and *Fross v. Wotton* (1935) 3 Cal.2d 384. The *Nelson* court had held that evidence of a person's exercise of the privilege against self-incrimination in a prior proceeding may be shown for impeachment purposes if he or she testifies in a self-exculpatory manner in a subsequent proceeding. Language in *Fross* indicated that unfavorable inferences may be drawn in a civil case from a party's claim of the privilege against self-incrimination during the case itself.

Secondary Sources

- 2 Witkin, Cal. Evidence (3rd ed. 1986) §§ 1093–1094
- Jefferson, California Evidence Benchbook (3rd ed. 1977) §§ 35.26–35.27

## 216
## Evidence of Settlement

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**You have heard evidence that there was a settlement between [insert names of settling parties]. You must not consider this settlement to determine responsibility for any harm. You may consider this evidence only to decide if [insert name of witness who settled]'s testimony is believable.**

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### DIRECTIONS FOR USE

Evidence of prior settlement is not automatically admissible: "Even if it appears that a witness could have been influenced in his testimony by the payment of money or the obtaining of a dismissal, the party resisting the admission of such evidence may still appeal to the court's discretion to exclude it under section 352 of the code." (*Granville v. Parsons* (1968) 259 Cal.App.2d 298, 305.)

### SOURCES AND AUTHORITY

- Evidence Code section 1152 (a), provides: "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it."

- "While evidence of a settlement agreement is inadmissible to prove liability, it is admissible to show bias or prejudice of an adverse party. Relevant evidence includes evidence relevant to the credibility of a witness." (*Moreno v. Sayre* (1984) 162 Cal.App.3d 116, 126 (internal citations omitted).)

Secondary Sources

- 1 Witkin, Cal. Evidence (3rd ed. 1986) §§ 424–432
- Jefferson, California Evidence Benchbook (3rd ed. 1977) §§ 34.15–34.24

## 217
## Statements Made to Physician
## (Previously Existing Condition)

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**[Insert name of health-care provider] has testified that [insert name of patient] made statements to [him/her] about [patient's] medical history. These statements helped [health-care provider] diagnose the patient's condition. You can use these statements to help you examine the basis of [health-care provider]'s opinion. However, you cannot use them for any other purpose.**

**[However, a statement by [patient] to [health-care provider] of [his/her] current medical condition may be considered proof of that medical condition.]**

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### DIRECTIONS FOR USE

This instruction does not apply to, and should not be used for, a statement of the patient's then-existing physical sensation, mental feeling, pain, or bodily health. Such statements are admissible as an exception to the hearsay rule under Evidence Code section 1250. This instruction also does not apply to statements of a patient regarding a prior mental or physical state if he or she is unavailable as a witness. (Evid. Code, § 1251.)

This instruction also does not apply to, and should not be used for, statements of a party that are offered into evidence by an opposing party. Such statements are admissible as an exception to the hearsay rule under Evidence Code section 1220.

### SOURCES AND AUTHORITY

- Statements pointing to the cause of a physical condition may be admissible if they are made by a patient to a physician. The statement must be required for proper diagnosis and treatment and is admissible only to show the basis of the physician's medical opinion. (*People v. Wilson* (1944) 25 Cal.2d 341, 348; *Johnson v. Aetna Life Insurance Co.* (1963) 221 Cal.App.2d 247, 252; *Willoughby v. Zylstra* (1935) 5 Cal.App.2d 297, 300–301.)

- Evidence Code section 1250(a) provides, in part:

> [E]vidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation … is not made inadmissible by the hearsay rules when:
>
> (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant.

- Evidence Code section 1251 provides, in part:

> [E]vidence of a statement of the declarant's state of mind, emotion, or physical sensation … at a time prior to the statement is not made inadmissible by the hearsay rule if:
>
> (a) The declarant is unavailable as a witness; and
>
> (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

Secondary Sources

- 1 Witkin, Cal. Evidence (3rd ed. 1986) § 734, p. 715

## 218
## Expert-Witness Testimony

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**During the trial you heard testimony from expert witnesses. The law allows an expert to state opinions about matters in his or her field of expertise even if he or she has not witnessed any of the events involved in the trial.**

**You do not have to accept an expert's opinion. As with any other witness, it is up to you to decide whether you believe the expert's testimony and choose to use it as a basis for your decision. You may believe all, part, or none of an expert's testimony. In deciding whether to believe an expert's testimony, you should consider:**

**(1) The expert's training and experience;**

**(2) The facts the expert relied upon; and**

**(3) The reasons for the expert's opinion.**

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### DIRECTIONS FOR USE

This instruction should not be given for expert witness testimony on the standard of care in professional malpractice cases if such testimony is uncontradicted. Uncontradicted testimony of an expert witness on the standard of care in a professional malpractice case is conclusive. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632–633; *Conservatorship of McKeown* (1994) 25 Cal.App.4th 502, 509; *Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 156.) In all other cases, the jury may reject expert testimony, provided that the jury does not act arbitrarily. (*McKeown, supra*, 25 Cal.App.4th at p. 509.)

For instruction on hypothetical questions see instruction 219, *Experts—Questions Containing Assumed Facts*. For instruction on conflicting expert testimony see instruction 220, *Conflicting Expert Testimony*.

## SOURCES AND AUTHORITY

- The "credibility of expert witnesses is a matter for the jury after proper instructions from the court." (*Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1264.)

- Under Evidence Code section 801 (a), expert witness testimony must relate to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 692.)

- Evidence Code section 720(a) provides, in part: "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates."

- Expert witnesses are qualified by special knowledge to form opinions on facts that they have not personally witnessed. (*Manney v. Housing Authority of Richmond* (1947) 79 Cal.App.2d 453, 459.)

- "Although a jury may not arbitrarily or unreasonably disregard the testimony of an expert, it is not bound by the expert's opinion. Instead, it must give to each opinion the weight which it finds the opinion deserves. So long as it does not do so arbitrarily, a jury may entirely reject the testimony of a plaintiff's expert, even where the defendant does not call any opposing expert and the expert testimony is not contradicted." (*Howard, supra,* 72 Cal.App.4th at p. 633.)

Secondary Sources

- 1 Witkin, Cal. Evidence (3rd ed. 1986) §§ 472–489
- Jefferson, California Evidence Benchbook (3rd ed. 1977) §§ 29.18–29.55

## 219
## Experts—Questions Containing Assumed Facts

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**The law allows expert witnesses to be asked questions that are based on assumed facts. You must decide how much weight to give the expert witnesses' answers.**

**In determining the weight to give to the expert's opinion, you should decide if the assumed facts are true.**

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### DIRECTIONS FOR USE

Juries may be instructed that they should weigh an expert witness's response to a hypothetical question based on their assessment of the accuracy of the assumed facts in the hypothetical question. (*Treadwell v. Nickel* (1924) 194 Cal. 243, 263–264.)

For instruction on expert witnesses generally see instruction 218, *Expert-Witness Testimony*. For instruction on conflicting expert testimony see instruction 220, *Conflicting Expert Testimony*.

### SOURCES AND AUTHORITY

- *Treadwell, supra*, 194 Cal. at pp. 263–264.
- The value of an expert's opinion depends on the truth of the facts assumed. (*Richard v. Scott* (1978) 79 Cal.App.3d 57, 63.)
- Hypothetical questions must be based on facts that are supported by the evidence: "It was decided early in this state that a hypothetical question to an expert must be based upon facts shown by the evidence and that the appellate court will place great reliance in the trial court's exercise of its discretion in passing upon a sufficiency of the facts as narrated." (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 339.)
- Hypothetical questions should not omit essential material facts. (*Coe v. State Farm Mutual Automobile Insurance* (1977) 66 Cal.App.3d 981, 994–995.)

- The jury should not be instructed that they are entitled to reject the entirety of an expert's opinion if a hypothetical assumption has not been proven. Rather, the jury should be instructed to determine the effect of that failure of proof on the value and weight of the expert opinion based on that assumption. (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 156.)

Secondary Sources

- 3 Witkin, Cal. Evidence (3rd ed. 1986) §§ 1848–1855
- Jefferson, California Evidence Benchbook (3rd ed. 1977) § 29.43, pp. 598–599

## 220
## Conflicting Expert Testimony

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**If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters that each witness relied on. You should also compare the experts' qualifications.**

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### DIRECTIONS FOR USE

Unless the issue is one that can be resolved only with expert testimony, the jury should not be instructed that they must accept the entire testimony of the expert whose testimony appears to be entitled to greater weight. (*Santa Clara County Flood Control and Water Conservation Dist. v. Freitas* (1960) 177 Cal.App.2d 264, 268.)

For instruction on expert witnesses generally see instruction 218, *Expert-Witness Testimony*. For instruction on hypothetical questions see instruction 219, *Experts—Questions Containing Assumed Facts*.

### SOURCES AND AUTHORITY

- *Santa Clara County Flood Control and Water Conservation Dist., supra,* 177 Cal.App.2d at p. 268.

- The "credibility of expert witnesses is a matter for the jury after proper instructions from the court." (*Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1264.)

Secondary Sources

- 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 303, p. 350

## 300
## Issues in the Case

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**[Name of plaintiff] claims that [he/she] was harmed by [name of defendant]'s negligence. To succeed on this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of defendant] was negligent;**

2. **That [name of plaintiff] was harmed; and**

3. **That [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s harm.**

**Just because a person was harmed does not, by itself, mean that another person [or entity] is legally responsible for the harm.**

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### DIRECTIONS FOR USE

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph.

The last sentence of this instruction is intended to addresses a false belief held by some jurors that they must assign fault just because there is an injury. Other instructions make it clear that the jury must find fault before determining if there is harm from the fault.

### SOURCES AND AUTHORITY

- Civil Code section 1714(a) provides, in part: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully, or by want of ordinary care, brought the injury upon himself." This statute is the foundation of negligence law in California. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112.)

- The basic elements of a negligence action are: (1) The defendant had a legal duty to conform to a standard of conduct to protect the plaintiff, (2) the defendant failed to

meet this standard of conduct, (3) the defendant's failure was the proximate or legal cause of the resulting injury, and (4) the plaintiff was damaged. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.)

- Restatement Second of Torts, section 328A, provides:

  In an action for negligence the plaintiff has the burden of proving
  (a) facts which give rise to a legal duty on the part of the defendant to conform to the standard of conduct established by law for the protection of the plaintiff,
  (b) failure of the defendant to conform to the standard of conduct,
  (c) that such failure is a legal cause of the harm suffered by the plaintiff, and
  (d) that the plaintiff has in fact suffered harm of a kind legally compensable by damages.

- The issue of whether a legal duty exists is an issue of law, not an issue of fact for the jury. (*Kentucky Fried Chicken v. Superior Court* (1997) 14 Cal.4th 814, 819; *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124.) The trier of fact ordinarily determines whether the defendant breached the standard of care, causation, and the amount of damages, if any.

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 729–734, 748, 749
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.4–1.18

## COMMENTARY

The word "harm" is used throughout these instructions, instead of terms like "loss," "injury," and "damage," because "harm" is all-purpose and suffices in their place.

## 301
## Basic Standard of Care

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**Negligence is the failure to use reasonable care to prevent harm to oneself or others.**

**A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.**

**You must decide how a reasonably careful person would have acted in [name of plaintiff/defendant]'s situation.**

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### SOURCES AND AUTHORITY

- "The formulation of the standard of care is a question of law for the court. Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether a party's conduct has conformed to the standard." (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 546 (internal citations omitted).)

- Restatement Second of Torts, section 282, defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."

- Restatement Second of Torts, section 283, provides: "Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."

- The California Supreme Court has stated: "Because application of [due care] is inherently situational, the amount of care deemed reasonable in any particular case will vary, while at the same time the standard of conduct itself remains constant, i.e., due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances. [Citations]." (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997; see also *Tucker v. Lombardo* (1956) 47 Cal.2d 457, 464.)

- The proper conduct of a reasonable person in a particular situation may become settled by judicial decision or may be established by statute or administrative regulation. (*Ramirez, supra,* 6 Cal.4th at p. 547.) (See instructions 330 to 333 on negligence per se.)

- Negligence can be found in the doing of an act, as well as in the failure to do an act. (Rest.2d Torts, § 284.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 750–751
- California Tort Guide (Cont.Ed.Bar 1996) § 1.3

## 302
## Standard of Care for Minors

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**[Name of plaintiff/defendant] is a child who was ___ years old at the time of the incident. Children are not held to the same standards of behavior as adults. A child is required to use the amount of care that a reasonably careful child of the same age, intelligence, knowledge, and experience would use in that same situation.**

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### SOURCES AND AUTHORITY

- Special standard: "Children are judged by a special subjective standard. … They are only required to exercise that degree of care expected of children of like age, experience and intelligence." (*Daun v. Truax* (1961) 56 Cal.2d 647, 654.)

- Negligence per se: If the negligence is negligence per se, violation of a statute will create a presumption of negligence that "may be rebutted by a showing that the child, in spite of the violation of the statute, exercised the care that children of his maturity, intelligence and capacity ordinarily exercise under similar circumstances." (*Daun, supra,* 56 Cal.2d at p. 655.)

- Restatement Second of Torts, section 283A, provides: "If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances."

- The standard of care for minors is not the standard of an "average" child of the same age; the standard is subjective, based on the conduct of a child of the same age, intelligence, and experience as the minor plaintiff or defendant. (*Cummings v. County of Los Angeles* (1961) 56 Cal.2d 258, 263.)

- An exception to this reduced standard of care may be found if the minor was engaging in an adult activity, such as driving. (*Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 732; *Neudeck v. Bransten* (1965) 233 Cal.App.2d 17, 21; see also Rest.2d Torts, § 283A, com. c.)

- Children under the age of five are incapable of contributory negligence as a matter of law. (*Christian v. Goodwin* (1961) 188 Cal.App.2d 650, 655.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 806–808
- California Tort Guide (Cont.Ed.Bar 1996) § 1.19

## 303
## Standard of Care for Physically Disabled Person

**A person with a physical disability is required to use the amount of care that a reasonably careful person who has the same physical disability would use in the same situation.**

### DIRECTIONS FOR USE

By "same" disability, this instruction is referring to the effect of the disability, not the cause.

### SOURCES AND AUTHORITY

- Restatement Second of Torts, section 283C, provides: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." (See also *Conjorsky v. Murray* (1955) 135 Cal.App.2d 478, 482; *Jones v. Bayley* (1942) 49 Cal.App.2d 647, 654.)

- Persons with mental illnesses are not covered by the same standard as persons with physical illnesses. (See *Bashi v. Wodarz* (1996) 45 Cal.App.4th 1314, 1323.)

- Civil Code section 41 provides: "A person of unsound mind, of whatever degree, is civilly liable for a wrong done by the person, but is not liable in exemplary damages unless at the time of the act the person was capable of knowing that the act was wrongful." This section applies to negligence. (*Bashi, supra,* 45 Cal.App.4th at p. 1321.)

- Restatement Second of Torts, section 283B, provides: "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances."

- As to contributory negligence, the courts agree with the Restatement's position that mental deficiency that falls short of insanity does not excuse conduct that is otherwise contributory negligence. (*Fox v. City and County of San Francisco* (1975) 47 Cal.App.3d 164, 169; Rest.2d Torts, § 464, com. g.)

Secondary Sources

- California Tort Guide (Cont.Ed.Bar 1996) § 1.20

## 304
## Intoxication

**A person is not necessarily negligent just because he or she used alcohol [or drugs]. However, people who drink alcohol [or take drugs] must act just as carefully as those who do not.**

### DIRECTIONS FOR USE

This instruction should be given only if there is evidence of alcohol or drug consumption. This instruction is not intended for situations in which intoxication is grounds for a negligence per se instruction (e.g., driving under the influence).

### SOURCES AND AUTHORITY

- Mere consumption of alcohol is not negligence in and of itself: "The fact that a person when injured was intoxicated is not in itself evidence of contributory negligence, but it is a circumstance to be considered in determining whether his intoxication contributed to his injury." (*Coakly v. Ajuria* (1930) 209 Cal. 745, 752.)

- Intoxication is not generally an excuse for failure to comply with the reasonable-person standard. (*Cloud v. Market Street Ry. Co.* (1946) 74 Cal.App.2d 92, 97.)

- Intoxication is not negligence as a matter of law, but it is a circumstance for the jury to consider in determining whether such intoxication was a contributing cause of an injury and is also a question of fact for the jury. (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 217; *Barr v. Scott* (1955) 134 Cal.App.2d 823, 827–828; see also *Emery v. Los Angeles Ry. Corp.* (1943) 61 Cal.App.2d 455, 461.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 1075, p. 473

## 310
## Plaintiff's Contributory Negligence

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**[Name of defendant] claims that [name of plaintiff]'s harm was caused in whole or in part by [name of plaintiff]'s own negligence. The amount that [name of plaintiff] is entitled to receive from [name of defendant] is reduced if [name of defendant] proves both of the following:**

1. **That [name of plaintiff] was negligent; and**

2. **That [name of plaintiff]'s negligence was a substantial factor in causing the harm.**

---

### DIRECTIONS FOR USE

This instruction should not be given absent substantial evidence that plaintiff was negligent. (*Drust v. Drust* (1980) 113 Cal.App.3d 1, 6.)

This instruction should be used only where the defendant claims that plaintiff was negligent, there is only one defendant, and the defendant does not claim that any other factor caused the harm.

### SOURCES AND AUTHORITY

- In *Li v. Yellow Cab Co.* (1975) 15 Cal.3d 804, 810, the Court concluded that the "all-or-nothing" rule of contributory negligence should be abandoned in favor of a rule that assesses liability in proportion to fault.

- Restatement Second of Torts, section 463, defines "contributory negligence" as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm."

- It is settled that the issue of contributory negligence must be presented to the jury whenever it is asserted as a defense and there is "some evidence of a substantial character" to support it. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548; *Scott v. Alpha Beta Co.* (1980) 104 Cal.App.3d 305, 310–311.)

- Courts have found that it is not error to use the phrase "contributory negligence" in a jury instruction on comparative negligence: "The use by the trial court of the phrase 'contributory negligence' in instructing on the concept of comparative negligence is innocuous. *Li v. Yellow Cab Co.* [citation] abolished the legal doctrine, but not the phrase or the concept of 'contributory negligence.' A claimant's negligence contributing causally to his own injury may be considered now not as a bar to his recovery, but merely as a factor to be considered in measuring the amount thereof." (*Bradfield v. Trans World Airlines, Inc.* (1979) 88 Cal.App.3d 681, 686.)

- The defendant has the burden of proving contributory negligence. (*Drust, supra,* 113 Cal.App.3d at p. 6.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Tort, §§ 1049–1058
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.38–1.39

## 311
## Apportionment of Responsibility

**More than one person's negligence, [including [name of plaintiff]'s], may have been a substantial factor in causing [name of plaintiff]'s harm. If so, you must decide how much responsibility each person has by determining the extent to which his or her negligence contributed to causing the harm.**

### DIRECTIONS FOR USE

Do not give the bracketed phrase if plaintiff's contributory negligence is not at issue.

### SOURCES AND AUTHORITY

- The Supreme Court has held that the doctrine of joint and several liability survived the adoption of comparative negligence: "[W]e hold that after *Li*, a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only 'in proportion to the amount of negligence attributable to the person recovering.' " (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 590, citing *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829.)

- The Court in *American Motorcycle Assn.* also modified the equitable indemnity rule "to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis." (*American Motorcycle Assn., supra,* 20 Cal.3d at p. 598.)

- Proposition 51 modified the doctrine of joint and several liability to limit each defendant's liability for noneconomic damages to the proportion of each defendant's percentage of fault.

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 51–55
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.52–1.59

## 312
## Decedent's Contributory Negligence

**[Name of defendant] claims that [name of decedent]'s death was caused in whole or in part by [name of decedent]'s own negligence. The amount [name of plaintiff] is entitled to receive from [name of defendant] is reduced if [name of defendant] proves both of the following:**

**1. That [name of decedent] was negligent; and**

**2. That [name of decedent's] negligence was a substantial factor in causing the harm.**

### DIRECTIONS FOR USE

This instruction should not be given absent substantial evidence that the decedent was negligent. (*Drust v. Drust* (1980) 113 Cal.App.3d 1, 6.)

This instruction should be used only where the defendant claims that decedent was negligent, there is only one defendant, and the defendant does not claim that any other factor caused the harm.

### SOURCES AND AUTHORITY

- "[P]rinciples of comparative fault and equitable indemnification support an apportionment of liability among those responsible for the loss, including the decedent, whether it be for personal injury or wrongful death." (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 285.)

- "[I]n wrongful death actions, the fault of the decedent is attributable to the surviving heirs whose recovery must be offset by the same percentage. [Citation.]" (*Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1395.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 1214, p. 650

## 320
## Reliance on Good Conduct of Others

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**Every person has a right to expect that every other person will use reasonable care, unless he or she knows, or should know, that the other person will act negligently [or violate the law].**

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### DIRECTIONS FOR USE

This instruction should not be used if the only other actor is the plaintiff and there is no evidence that the plaintiff acted unreasonably. (*Springer v. Reimers* (1970) 4 Cal.App.3d 325, 336.)

### SOURCES AND AUTHORITY

- The general rule is that "every person has a right to presume that every other person will perform his duty and obey the law and in the absence of reasonable grounds to think otherwise, it is not negligence to assume that he is not exposed to danger which could come to him only from violation of law or duty by such other person." (*Celli v. Sports Car Club of America, Inc.* (1972) 29 Cal.App.3d 511, 523.) "However, this rule does not extend to a person who is not exercising ordinary care, nor to one who knows or, by the exercise of such care, would know that the law is not being observed." (*Malone v. Perryman* (1964) 226 Cal.App.2d 227, 234.)

- Defendants are entitled to rely on the reasonable conduct of third parties who owe a duty of care to the plaintiff. (*Tucker v. Lombardo* (1956) 47 Cal.2d 457, 467.) The central issue addressed by the instruction is whether or not the bad act of the third person was foreseeable by the defendant. (*Whitton v. State of California* (1979) 98 Cal.App.3d 235, 244–246.) "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." (Rest.2d Torts, § 449; *Bigbee v. Pacific Telephone and Telegraph Co.* (1983) 34 Cal.3d 49, 58.)

- Many cases involving issues of third-party criminal conduct are analyzed as questions of law — i.e., existence of a duty, which may require analysis of foreseeability. (See

*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678; *Kentucky Fried Chicken v. Superior Court* (1997) 14 Cal.4th 814.)

- In cases where a third party commits a criminal act, the defendant is generally not liable for failure to protect the plaintiff from the resulting harm. The exceptions are (1) where the defendant has a special relationship to the plaintiff, (2) where the defendant has undertaken an obligation to protect the plaintiff, or (3) where the defendant's conduct created or increased the risk of harm through the misconduct. (Rest.2d Torts, § 302B, com. e.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 1066–1068

## 321
## Duty of Care Owed Children

**An adult must anticipate the ordinary behavior of children. An adult must be more careful when dealing with children than with other adults.**

### DIRECTIONS FOR USE

This instruction is to be used where the plaintiff seeks damages for injury to a minor.

For standard of care for minors, see instruction 302, *Standard of Care for Minors*.

### SOURCES AND AUTHORITY

- "A child of immature years is expected to exercise only such care as pertains to childhood, and all persons dealing with such a child are chargeable with such knowledge. As a result, one dealing with children is bound to exercise a greater amount of caution than he would were he dealing with an adult. [Citations]." *(Kataoka v. May Dept. Stores Co.* (1943) 60 Cal.App.2d 177, 182–183.)

- *Schwartz v. Helms Bakery, Ltd.* (1967) 67 Cal.2d 232, 240, 243; *Hilyar v. Union Ice Co.* (1955) 45 Cal.2d 30, 37.

- "A greater degree of care is generally owed to children because of their lack of capacity to appreciate risks and to avoid danger." (*McDaniel v. Sunset Manor Co*. (1990) 220 Cal.App.3d 1, 7, citing *Casas v. Maulhardt Buick, Inc.* (1968) 258 Cal.App.2d 692, 697.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 809–810
- California Tort Guide (Cont.Ed.Bar 1996) § 1.19

## 322
## Custom or Practice

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**You may consider customs or practices in the community in deciding whether [name of plaintiff/defendant] acted reasonably. Customs and practices do not necessarily determine what a reasonable person would have done in [name of plaintiff/defendant]'s situation. They are only factors for you to consider.**

**Following a custom or practice does not excuse conduct that is unreasonable. You should consider whether the custom or practice itself is reasonable.**

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### DIRECTIONS FOR USE

An instruction stating that evidence of custom is not controlling on the issue of standard of care should not be given in professional malpractice cases in which expert testimony is used to set the standard of care. (See *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 277.) The instruction may be used if the standard of care is within common knowledge. (See *Leonard v. Watsonville Community Hospital* (1956) 47 Cal.2d 509, 519.)

This instruction is also inappropriate in cases involving strict liability (*Titus v. Bethlehem Steel Corp.* (1979) 91 Cal.App.3d 372, 378) or cases involving negligence in the use of public roads (*Shuff v. Irwindale Trucking Co.* (1976) 62 Cal.App.3d 180, 187).

### SOURCES AND AUTHORITY

- Evidence of custom and practice is relevant, but not conclusive, on the issue of the standard of care in cases of ordinary negligence. (*Holt v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 427, 435.)

- Restatement Second of Torts, section 295A, provides: "In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them."

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 754–755

## 323
## Amount of Caution Required In Dangerous Situations

**People must be extremely careful when they deal with dangerous items or participate in dangerous activities. [Insert type of dangerous item or activity] is dangerous in and of itself. The risk of harm is so great that even the slightest carelessness is considered negligence.**

### DIRECTIONS FOR USE

An instruction on the standard of care for extremely dangerous activities is proper only "in situations where the nature of the activity or substance is so inherently dangerous or complex, as such, that the hazard persists despite the exercise of ordinary care." (*Benwell v. Dean* (1964) 227 Cal.App.2d 226, 233; see also *Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 544.)

This instruction should not be given at the same time as an instruction pertaining to standard of care for employees who have to work in dangerous situations. In appropriate cases, juries may be instructed that a person of ordinary prudence is required to exercise extreme caution when engaged in a dangerous activity. (*Borenkraut v. Whitten* (1961) 56 Cal.2d 538, 544–546.) However, this rule does not apply when a person's lawful employment requires that he or she must work in a dangerous situation. (*McDonald v. City of Oakland* (1967) 255 Cal.App.2d 816, 827.) This is because "reasonable men who are paid to give at least part of their attention to their job" may not be as able to maintain the same standards for personal safety as nonemployees. (*Young v. Aro Corp.* (1974) 36 Cal.App.3d 240, 245.) (See instruction 324, *Employee Required to Work in Dangerous Situations*.)

### SOURCES AND AUTHORITY

- Even a slight deviation from the standards of care will constitute negligence in cases involving dangerous instrumentalities. (*Borenkraut, supra,* 56 Cal.2d at p. 545.)

- Dangerous instrumentalities include fire, firearms, explosive or highly inflammable materials, and corrosive or otherwise dangerous or noxious fluids. (*Warner v. Santa Catalina Island Co.* (1955) 44 Cal.2d 310, 317.)

- In *Menchaca*, the Court held that driving a motor vehicle "may be sufficiently dangerous to warrant special instructions, but it is not so hazardous that it always requires 'extreme caution.' " (*Menchaca, supra,* 68 Cal.2d at p. 544.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 762–766

## 324
## Employee Required to Work in Dangerous Situations

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**An employee required to work under dangerous conditions must use the amount of care for [his/her] own safety that a reasonably careful employee would use under the same conditions.**

**In deciding if [name of plaintiff] was negligent, you should consider how much attention [his/her] work demanded. You should also consider whether [name of plaintiff]'s job required [him/her] to take risks that a reasonably careful person would not normally take under ordinary circumstances.**

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### DIRECTIONS FOR USE

This type of instruction should not be given in cases involving freeway collisions between private and commercial vehicles. (*Shuff v. Irwindale Trucking Co.* (1976) 62 Cal.App.3d 180, 187.)

An instruction on this principle is "aimed at situations where the employment conditions lessen the plaintiff's ability to take precautions." (*Von Beltz v. Stuntman, Inc.* (1989) 207 Cal.App.3d 1467, 1485.) It does not apply where the plaintiff has ample opportunity to consider various precautions (*ibid.*) or when employees act pursuant to choice rather than necessity. (*Roberts v. Guillory* (1972) 25 Cal.App.3d 859, 861–862.)

### SOURCES AND AUTHORITY

- This type of instruction "soften[ed] the impact of instructing on the issue of contributory negligence" (*Young v. Aro Corp.* (1974) 36 Cal.App.3d 240, 244) at a time when contributory negligence was a complete bar to a plaintiff's recovery. The instruction may be given in cases involving comparative fault. (See, e.g., *Johnson v. Tosco Corp.* (1991) 1 Cal.App.4th 123, 136–137.)

- "It has long been recognized that 'where a person must work in a position of possible danger the amount of care which he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case.' [Citations]." (*Austin v. Riverside Portland Cement Co.* (1955) 44 Cal.2d 225, 239.)

- "Considered in the light of the realities of his working life, the laborer's duty may become considerably restricted in scope. In some instances he may find himself powerless to abandon the task at hand with impunity whenever he senses a possible danger; in others, he may be uncertain as to which person has supervision of the job or control of the place of employment, and therefore unsure as to whom he should direct his complaint; in still others, having been encouraged to continue working under conditions where danger lurks but has not materialized, he may be baffled in making an on-the-spot decision as to the imminence of harm. All of these factors enter into a determination whether his conduct falls below a standard of due care." (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 501 (citation omitted).)

## 325
## Amount of Caution Required in Transmitting Electric Power

**People and companies must be very careful in constructing, insulating, inspecting, maintaining, and repairing power lines and transmission equipment at all places where it is reasonably probable that they will cause harm to persons or property.**

### DIRECTIONS FOR USE

The cases have crafted a specific standard of care for the construction and maintenance of power lines, and juries must be instructed on this standard upon request. (*Scally v. Pacific Gas and Electric Co.* (1972) 23 Cal.App.3d 806, 816.)

### SOURCES AND AUTHORITY

- Electric power lines are considered dangerous instrumentalities. (*Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 525.)

- The requirement to insulate wires applies to only those wires that may come into contact with people or property: "While an electric company is not under an absolute duty to insulate or make the wires safe in any particular manner, it does have a duty to make the wires safe under all the exigencies created by the surrounding circumstances. The duty of an electric company is alternative, i.e., either to insulate the wires or to so locate them to make them comparatively harmless." (*Scally, supra,* 23 Cal.App.3d at pp. 815–816.)

- *Dunn v. Pacific Gas and Electric Co.* (1954) 43 Cal.2d 265, 272–74; *McKenzie v. Pacific Gas and Electric Co.* (1962) 200 Cal.App.2d 731, 736 (disapproved on another point in *Di Mare v. Cresci* (1962) 58 Cal.2d 292, 299.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 763, pp. 103–104
- California Tort Guide (Cont.Ed.Bar 1996) §§ 7.1–7.12

## 330
## Presumption of Negligence per se

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**[Insert citation to statute, regulation, or ordinance] states: _____.**

**If you decide:**

**(a) That [name of plaintiff/defendant] violated this law, and**

**(b) That the violation was a substantial factor in bringing about the harm, then you must find that [name of plaintiff/defendant] was negligent [unless you also find that the violation was excused].**

**If you find that [name of plaintiff/defendant] did not violate this law or that the violation was not a substantial factor in bringing about the harm [or if you find the violation was excused], then you must still decide whether [name of plaintiff/ defendant] was negligent based on the other instructions.**

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### DIRECTIONS FOR USE

If a rebuttal is offered on the grounds that the violation was excused, then the bracketed portion of (b) in the second paragraph should be read. For an instruction on excuse, see instruction 332, *Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused).*

If the statute is lengthy, the judge may want to read it at the end of this instruction instead of at the beginning. The instruction would then need to be revised, to tell the jury that they will be hearing the statute at the end.

Rebuttal of the presumption of negligence is addressed in the instructions that follow (see instructions 332 and 333).

## SOURCES AND AUTHORITY

- Evidence Code section 669 codifies the commonlaw presumption of negligence per se and the grounds for rebutting the presumption. Subdivision (a) sets forth the conditions that cause the presumption to arise:

  > The failure of a person to exercise due care is presumed if:
  > (1) He violated a statute, ordinance, or regulation of a public entity;
  > (2) The violation proximately caused death or injury to person or property;
  > (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
  > (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

- In general, the first two elements of Evidence Code section 669(a) are questions to be decided by the trier of fact, while the last two are always questions of law. (*Cade v. Mid-City Hospital Corp.* (1975) 45 Cal.App.3d 589, 597; see also Law Revision Cal. Com. com., Evid. Code, § 669.) However, in some circumstances violation of the law and/or causation can be decided as questions of law. In those cases, it is unnecessary to instruct the jury on the elements decided by the court.

- This jury instruction addresses the establishment of the two factual elements underlying the presumption of negligence. If they are not established, then a finding of negligence cannot be based on the alleged statutory violation. However, negligence can still be proven by other means. (*Nunneley v. Edgar Hotel* (1950) 36 Cal.2d 493, 500–501.)

- Statutory negligence, or negligence per se, sets the conduct prescribed by the statute as the standard of care. (*Casey v. Russell* (1982) 138 Cal.App.3d 379, 383.) Criminal statutes may be used to set the applicable standard of care. (See *Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547.) Federal statutes and regulations may be adopted as the standard of care in a negligence action. (*DiRosa v. Showa Denko K. K.* (1996) 44 Cal.App.4th 799, 807.)

- Safety orders and regulations of administrative agencies may be used to set the standard of care. However, an administrative agency cannot independently impose a duty of care unless the Legislature has properly delegated that authority to the agency

by. (*California Service Station & Auto. Repair Assn. v. American Home Assurance Co.* (1998) 62 Cal.App.4th 1166, 1175.)

- This doctrine applies to negligence of the defendant or contributory negligence of the plaintiff. (*Nevis v. Pacific Gas and Electric, Co.* (1954) 43 Cal.2d 626, 631, fn.1.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 818–837
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.28–1.31

## 331
## Presumption of Negligence per se
## (Causation Only at Issue)

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**[Insert citation to statute, regulation, or ordinance] states:**
**_____.**
**A violation of this law has been established and is not an issue for you to decide.**

**[However, you must decide if the violation was excused. If it was not excused, then you] [You] must decide if the violation was a substantial factor in harming [name of plaintiff].**

**If you decide that the violation was a substantial factor, then you must find that [name of plaintiff/defendant] was negligent.**

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### DIRECTIONS FOR USE

The California Law Revision Commission comment on Evidence Code section 669 states that the trier of fact usually decides the question of whether the violation occurred. However, "if a party admits the violation or if the evidence of the violation is undisputed, it is appropriate for the judge to instruct the jury that a violation of the statute, ordinance, or regulation has been established as a matter of law." In such cases, the jury would decide causation and, if applicable, the existence of any justification or excuse. For an instruction on excuse, see instruction 332, *Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused).*

### SOURCES AND AUTHORITY

- Evidence Code section 669

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 818–837
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.28–1.31

## 332
## Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused)

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**A violation of a law is excused if one of the following is true:**

**(a) The violation was reasonable because of [name of plaintiff/defendant]'s [specify type of "incapacity"]; [or]**

**(b) Despite using reasonable care, [name of plaintiff/defendant] was not able to obey the law; [or]**

**(c) [Name of plaintiff/defendant] faced an emergency that was not caused by [his/her] own misconduct; [or]**

**(d) Obeying the law would have involved a greater risk of harm to [name of plaintiff/defendant] or to others; [or]**

**(e) [Other reason excusing or justifying noncompliance.]**

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### DIRECTIONS FOR USE

Subparagraph (b), regarding an attempt to comply with the applicable statute or regulation, should not be given where the evidence does not show such an attempt. (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 423.) Subparagraph (b) should be used only in special cases because it relies on the concept of due care to avoid a charge of negligence per se.

### SOURCES AND AUTHORITY

- Evidence Code section 669(b)(1) provides: "This presumption may be rebutted by proof that [t]he person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law."

- The language of section 669(b)(1) appears to be based on the following Supreme Court holding: "In our opinion the correct test is whether the person who has violated

a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." (*Alarid v. Vanier* (1958) 50 Cal.2d 617, 624.)

- In *Casey v. Russell* (1982) 138 Cal.App.3d 379, the court held that an instruction that tracked the language of section 669(b)(1) was erroneous because it "[did] not adequately convey that there must be some special circumstances which justify violating the statute." (*Id*. at p. 385.) The court's opinion cited section 288A of the Restatement Second of Torts for a list of the types of emergencies or unusual circumstances that may justify or excuse a violation of the statute:

  (a) The violation is reasonable because of the actor's incapacity;
  (b) He neither knows nor should know of the occasion for compliance;
  (c) He is unable after reasonable diligence or care to comply;
  (d) He is confronted by an emergency not due to his own misconduct;
  (e) Compliance would involve a greater risk of harm to the actor or to others.

  According to the Restatement comment, this list of circumstances is not meant to be exclusive.

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 818–837
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.28–1.31

## 333
## Negligence per se: Rebuttal of the Presumption of Negligence (Violation of Minor Excused)

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**[Name of plaintiff/defendant] claims that even if [he/she] violated the law, [he/she] is not negligent because [he/she] was _____ years old at the time of the incident. If you find that [name of plaintiff/defendant] was as careful as a reasonably careful child of the same age, intelligence, knowledge and experience would have been in the same situation, then [name of plaintiff/defendant] was not negligent.**

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### DIRECTIONS FOR USE

This instruction does not apply if the minor is engaging in an adult activity. (Evid. Code, § 669(b)(2).)

### SOURCES AND AUTHORITY

- Evidence Code section 669(b)(2) provides: "The presumption may be rebutted if the person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications."

- "The per se negligence instruction is predicated on the theory that the Legislature has adopted a statutory standard of conduct that no reasonable man would violate, and that all reasonable adults would or should know such standard. But this concept does not apply to children." (*Daun v. Truax* (1961) 56 Cal.2d 647, 654–655.)

- An exception to this reduced standard of care may be found if the minor was engaging in an adult activity, such as driving. (*Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 732; *Neudeck v. Bransten* (1965) 233 Cal.App.2d 17, 21; see also Rest.2d Torts, § 283A, com. c.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 818–837
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.28–1.31

## 335
## Sale of Alcoholic Beverages to Obviously Intoxicated Minors (Bus. & Prof. Code, § 25602.1)

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**[Name of plaintiff] claims [name of defendant] is responsible for [name of plaintiff]'s harm because [name of defendant] [sold] [or] [gave] alcoholic beverages to [name of alleged minor], a minor who was already obviously intoxicated.**

**To succeed, [name of plaintiff] must prove all of the following:**

1. **That [name of defendant] was [licensed] [authorized] [required to be licensed or authorized] to sell alcoholic beverages;**

2. **That [name of defendant] sold [or gave] alcoholic beverages to [name of alleged minor];**

3. **That [name of alleged minor] was less than 21 years old at the time;**

4. **That when [name of defendant] provided the alcoholic beverages, [name of alleged minor] displayed symptoms that would lead a reasonable person to conclude that [name of alleged minor] was intoxicated;**

5. **That, while intoxicated, [name of alleged minor] harmed [name of plaintiff]; and**

6. **That [name of defendant]'s selling [or giving] alcoholic beverages to [name of alleged minor] was a substantial factor in causing [name of plaintiff]'s harm.**

**In deciding whether [name of alleged minor] was obviously intoxicated, you may consider whether [name of alleged minor] displayed one or more of the following symptoms to [name of defendant] before the alcoholic beverages were provided: Impaired judgment; alcoholic breath; incoherent or slurred speech; poor muscular coordination; staggering or unsteady walk or loss**

**of balance; loud, boisterous, or argumentative conduct; flushed face; or other symptoms of intoxication. The mere fact that [he/she] had been drinking is not enough.**

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## DIRECTIONS FOR USE

For purposes of this instruction, a "minor" is someone under the age of 21.

## SOURCES AND AUTHORITY

- Business and Professions Code, section 25602.1, provides, in relevant part: "[A] cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed, or required to be licensed … or any person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave, who sells, furnishes, gives or causes to be sold, furnished or sold, any alcoholic beverage, to any obviously intoxicated minor where the furnishing, sale or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person."

- In *Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1140, the court cited the following as the "proper test" for determining whether a patron is "obviously intoxicated": "The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known outward manifestations which are 'plain' and 'easily seen or discovered.' If such outward manifestations exist and the seller still serves the customer so affected, he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent."

- The description of symptoms is derived from an instruction approved in *Jones v. Toyota Motor Co., Ltd.* (1988) 198 Cal.App.3d 364, 370.

- In *Hernandez v. Modesto Portuguese Pentacost Assn.* (1995) 40 Cal.App.4th 1274, 1282, the court held that the phrase "causes to be sold" "requires an affirmative act directly related to the sale of alcohol which necessarily brings about the resultant action to which the statute is directed, i.e., the sale of alcohol to an obviously intoxicated minor."

- In *Salem v. Superior Court* (1989) 211 Cal.App.3d 595, 603, the court held that injury resulting from intoxication of a person to whom an intoxicated minor gives liquor is not injury proximately resulting from the sale to the intoxicated minor.

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Tort, § 884, p. 255
- California Tort Guide (Cont.Ed.Bar 1996) § 4.63

## 340
## Causation: Substantial Factor

**A "substantial factor" is a factor that a reasonable person would consider to be a cause of the harm but is more than a trivial factor in causing it.**

### DIRECTIONS FOR USE

In asbestos-related cancer cases, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 requires an additional instruction regarding exposure to a particular product.

### SOURCES AND AUTHORITY

- *Bockrath v. Aldrich* (1999) 21 Cal.4th 71, 79; *Rutherford v. Owens-Illinois, Inc*. (1997) 16 Cal.4th 953; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041

- "However the test is phrased, causation in fact is ultimately a matter of probability and common sense." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253, relying on Rest.2d of Torts, § 433B, com. b.)

- *Espinosa v. Little Company of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1313–1314

- Restatement Second of Torts, section 431, provides: "The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." This section "correctly states California law as to the issue of causation in tort cases." (*Wilson v. Blue Cross of Southern California* (1990) 222 Cal.App.3d 660, 673.)

- This instruction incorporates Restatement Second of Torts, section 431, comment a, which provides, in part: "The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense' which includes every one of the great number of events without which any happening would not have occurred."

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 968, 968A
- California Tort Guide (Cont.Ed.Bar 1996) §§ 1.13–1.15

## 341
## Causation: Multiple Causes

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**A person's negligence may combine with another factor to cause harm. If you find that [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s harm, then [name of defendant] is responsible for [name of plaintiff]'s harm. [Name of defendant] cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [name of plaintiff]'s harm.**

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### DIRECTIONS FOR USE

This instruction will apply only when negligence is the theory asserted against the defendant. This instruction should be modified if the defendant is sued on a theory of product liability or intentional tort.

### SOURCES AND AUTHORITY

- Multiple causation, or "concurrent cause," is the basis for the doctrine of comparative fault: "For there to be comparative fault there must be more than one contributory or concurrent legal cause of the injury for which recompense is sought." (*Doupnik v. General Motors Corp.* (1991) 225 Cal.App.3d 849, 866.)

- In *Logacz v. Limansky* (1999) 71 Cal.App.4th 1149,1152, the appellate court held that the trial court's error in refusing a concurrent cause instruction was prejudicial.

- In *Espinosa v. Little Company of Mary Hospital* (1995) 31 Cal.App.4th 1304, the Court of Appeal reversed the trial court's grant of nonsuit in a medical malpractice case. The plaintiff produced evidence indicating that three causes were responsible for his brain damage, including two that were attributable to the defendants. The trial court ruled in favor of the nonsuit, finding that the plaintiff had not shown causation. The reviewing court disagreed: "Clearly, where a defendant's negligence is a concurring cause of an injury, the law regards it as a legal cause of the injury, regardless of the extent to which it contributes to the injury." (*Id.* at pp. 1317–1318.)

- A concurrent cause can be either another party's negligence or a natural cause. In *Hughey v. Candoli* (1958) 159 Cal.App.2d 231, the court held that the defendant's

negligence in an automobile accident was a proximate cause of the death of a fetus, even though the fetus also had a heart defect: "In this situation the concurrence of the nontortious cause does not absolve defendant from liability for the tortious one." (*Id*. at p. 240.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 970
- California Tort Guide (Cont.Ed.Bar 1996) § 1.16

## 342
## Causation: Third-Party Conduct as Superseding Cause

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**[Name of defendant] claims that [he/she/it] is not responsible for [name of plaintiff]'s harm because of the later misconduct of [insert name]. To avoid legal responsibility for the harm, [name of defendant] must prove all of the following:**

1. **That [insert name]'s conduct occurred after the conduct of [name of defendant];**

2. **That a reasonable person would consider [insert name]'s conduct as a highly unusual or an extraordinary response to the situation;**

3. **That [name of defendant] did not know and had no reason to expect that [insert name] would act in a [negligent/wrongful] manner; and**

4. **That the kind of harm resulting from [insert name]'s conduct was different from the kind of harm that could have been reasonably expected from [name of defendant]'s conduct.**

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### DIRECTIONS FOR USE

California courts have held that a superseding cause instruction must be given where the issue is raised by the evidence. (*Paverud v. Niagara Machine and Tool Works* (1987) 189 Cal.App.3d 858, 863.) The issue of superseding cause should be addressed directly in a specific instruction. (*Self v. General Motors* (1974) 42 Cal.App.3d 1, 10.)

Defendants, not plaintiffs, would normally request this type of instruction. In *Fish v. Los Angeles Dodgers Baseball Club* (1976) 56 Cal.App.3d 620, plaintiff requested the superseding cause instruction in response to defendant's closing argument. However, the court found that the doctrine of superseding causation was inapplicable to the facts of that case. (*Id*. at p. 639.) Instead, the court held that failure to give the concurrent cause instruction on behalf of plaintiff was error. (*Id.* at p. 641.)

## SOURCES AND AUTHORITY

- Restatement Second of Torts, section 440, provides: "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."

- The California courts have adopted the Restatement sections on superseding causation. (*Stewart v. Cox* (1961) 55 Cal.2d 857, 864; *Brewer v. Teano* (1995) 40 Cal.App.4th 1024.)

- "Under the theory of supervening cause, the chain of causation that would otherwise flow from an initial negligent act is broken when an independent act intervenes and supersedes the initial act." (*Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 26–27.)

- Superseding cause is an affirmative defense that must be proved by the defendant. (*Maupin v. Widling* (1987) 192 Cal.App.3d 568, 578.) If a third party's negligence is asserted as a superseding cause,"[t]he elements of the defense include either foreseeability of the third party's negligence or of the harm, or the highly extraordinary nature or manner of the third party's acts." (*Paverud, supra,* 189 Cal.App.3d at p. 863.)

- The issue of superseding cause turns on foreseeability as it relates to both (1) the defendant's conduct, and (2) the nature of the resulting injury. (*Akins v. County of Sonoma* (1967) 67 Cal.2d 185, 199–200; *Paverud, supra,* 189 Cal.App.3d at pp. 862–863; *Martinez v. Vintage Petroleum* (1998) 68 Cal.App.4th 695, 700–701.)

- Courts have emphasized that "even if the intervening negligent conduct is not foreseeable, [defendant] is not relieved of liability unless the risk of harm suffered also was unforeseeable. [Citations.]." (*Pappert v. San Diego Gas and Electric Co.* (1982) 137 Cal.App.3d 205, 210–211.) In *Pappert*, the court found that the trial court erred in submitting to the jury the issue of whether decedent's negligence was a superseding cause: "Here, the injury sustained, death by electrocution . . . is precisely and directly the result to be expected when a person trimming a tree on his residential property is exposed to the charge from an uninsulated 12,000 volt power line passing through its foliage." (*Id*. at 211.)

- California courts approach the issue of superseding cause by addressing it after affirmative findings have been made on both negligence and causation. Some opinions have noted that this approach may be analytically incorrect because, if a superseding

cause is found, then it negates any causation involving the defendant. (*Ewart v. Southern California Gas Co.* (1965) 237 Cal.App.2d 163, 169.)

- Much of this instruction is based on section 447 of the Restatement Second of Torts:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
> (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
> (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

- Note that section 447 is phrased in the negative. It sets forth the three circumstances in which a third party's negligence is *not* a superseding cause. Section 447 does not state when an intervening force *is* a superseding cause, except by negative implication. However, if all three factors are absent, the independent cause must be superseding. To make this point clearer, this instruction is phrased in the affirmative at the outset and requires the defendant to prove that all the factors are absent. (See *Martinez, supra,* 68 Cal.App.4th at p. 702.)

- In this instruction, the term "extraordinary" means "unforeseeable," as in "statistically extremely improbable" or "unpredictable." (*Campodonico v. State Auto Parks, Inc.* (1970) 10 Cal.App.3d 803, 807.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 975–976
- California Tort Guide (Cont.Ed.Bar 1996) § 1.17

## 343
## Causation: Intentional Tort/Criminal Act as Superseding Cause

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**[Name of defendant] claims that [he/she/it] is not responsible for [name of plaintiff]'s harm because of the later [criminal/intentional] conduct of [insert name]. [Name of defendant] is not responsible for [name of plaintiff]'s harm if [name of defendant] proves both of the following:**

1. **That the [intentional/criminal] conduct of [insert name] happened after the conduct of [name of defendant]; and**

2. **That [name of defendant] did not know and could not reasonably have expected that another person would take advantage of the situation created by the [name of defendant's] conduct to commit this type of act.**

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### SOURCES AND AUTHORITY

- Restatement Second of Torts, section 448, provides: "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."

- The California courts have adopted section 448. (*Kane v. Hartford Accident and Indemnity Co.* (1979) 98 Cal.App.3d 350, 360.)

- Section 449 provides: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." The Court in *Landeros v. Flood* (1976) 17 Cal.3d 399, 411, relied on section 449.

- If the criminal or tortious conduct encountered by the plaintiff was not foreseeable at the time of defendant's negligence, then the defendant will not be liable. (*Kane,*

*supra*, 98 Cal.App.3d at p. 360 [rape not a result of failure to uncover bonded employee's prior theft-related offenses].)

- Courts have observed that "[c]riminal conduct which causes injury will ordinarily be deemed the proximate cause of an injury, superseding any prior negligence which might otherwise be deemed a contributing cause. [Citation.]" (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1449.) However, "[t]he common law rule that an intervening criminal act is, by its very nature, a superseding cause has lost its universal application and its dogmatic rigidity." (*Kane, supra,* 98 Cal.App.3d at p. 360.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 992–994
- California Tort Guide (Cont.Ed.Bar 1996) § 1.17

## 344
## Alternative Causation

**You may find that more than one of the defendants was negligent, but that only one of them could have actually caused [name of plaintiff]'s harm. If you also find that it is uncertain which defendant is actually responsible, you must decide that each defendant's conduct was a cause of the harm.**

**However, if a defendant proves that [he/she/it] did not cause [name of plaintiff]'s harm, then you must find that defendant not responsible.**

### SOURCES AND AUTHORITY

- This instruction is based on the rule stated in the case of *Summers v. Tice* (1948) 33 Cal.2d 80, 86, in which the Court held that the burden of proof on causation shifted to the two defendants to prove that each was not the cause of plaintiff's harm: "They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless."

- Restatement Second of Torts, section 433B(3), provides: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm."

- The *Summers* rule applies to multiple causes, at least one of which is tortious. (*Vahey v. Sacia* (1981) 126 Cal.App.3d 171, 177, fn. 2.) Thus, it can apply where there is only one defendant. (*Ibid*.) However, California courts apply the alternative liability theory only when all potential tortfeasors have been joined as defendants. (*Setliff v. E. I. Du Pont De Nemours & Co.* (1995) 32 Cal.App.4th 1525, 1534–1535.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 971
- California Tort Guide (Cont.Ed.Bar 1996) § 1.16

## 350
## Good Samaritan

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**[Name of defendant] claims that [he/she] is not responsible for [name of plaintiff]'s harm because [name of defendant] was voluntarily trying to protect [name of plaintiff] from harm. If you decide that [name of defendant] was negligent, [name of defendant] is not responsible unless [name of plaintiff] proves:**

**1. [(a) That [name of defendant]'s failure to use reasonable care added to the risk of harm;] [or]**

**[(b) That [name of defendant]'s conduct caused [name of plaintiff] to reasonably rely on [name of defendant]'s protection;]**

**and**

**2. That the [additional risk/reliance] resulted in harm to [name of plaintiff].**

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### DIRECTIONS FOR USE

This issue would most likely come up in an emergency situation, but not always. For this instruction to be appropriate, the harm must result from either 1(a) or (b) or both. Either or both 1(a) or (b) should be selected, depending on the facts.

### SOURCES AND AUTHORITY

- *Westbrooks v. State of California* (1985) 173 Cal.App.3d 1203

- It is a well-established general rule that a person who has not created a danger has no duty to come to the aid of a third party to protect the third party against injury from that danger. However, "the volunteer who, having no initial duty to do so, undertakes to come to the aid of another--the 'good Samaritan' ... is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking. [Citation.]" (*Williams v. State of California* (1983) 34 Cal.3d 18, 23.)

The reliance must have exposed the victim to a risk of harm that was greater than the harm to which the victim was already exposed. (*Id*. at p. 28.)

- Restatement Second of Torts, section 323, provides: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if: his failure to exercise such care increases the risk of such harm, or the harm is suffered because of the other's reliance upon the undertaking."

  Under section 323, negligent conduct, standing alone, is insufficient to justify the imposition of liability.

- While both *Williams* and *Westbrooks* involved law enforcement officers, application of the doctrine is not limited to that context. In *Williams*, the Court observed that cases involving police officers who render assistance in non–law enforcement situations involve "no more than the application of the duty of care attaching to any volunteered assistance." (*Williams, supra,* 34 Cal.3d at pp. 25–26.) Also, note that section 323 was cited as a "general principle" by the Court in *Coffee v. Mc Donnell-Douglas Corp*. (1972) 8 Cal.3d 551, 557, fn. 6, a case that did not involve law enforcement officers.

- Statutory exceptions to Good Samaritan liability include immunities under certain circumstances for medical licensees (Bus. & Prof. Code, §§ 2395–2398), nurses (Bus. & Prof.Code, §§ 2727.5, 2861.5), dentists (Bus. & Prof. Code, § 1627.5), rescue teams (Health & Saf.Code, § 1317), paramedics (Health & Saf. Code, § 1799.104), those acting to remove food from the throat of a person who is choking (Health & Saf.Code, § 114180), and first-aid volunteers (Gov. Code, § 50086).

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 868–872

## 351
## Express Assumption of Risk

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**[Name of defendant] claims that [name of plaintiff] may not recover any damages because [name of plaintiff] agreed before the incident that [name of plaintiff] would not hold [name of defendant] responsible for [name of plaintiff]'s damages.**

**If [name of defendant] proves that there was such an agreement and that it applies to [name of plaintiff]'s claim, then you must find that [name of defendant] is not responsible for [name of plaintiff]'s harm.**

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### DIRECTIONS FOR USE

In reviewing the case law in this area, it appears that both the interpretation of a waiver agreement and application of its legal effect are generally resolved by the judge before trial. This is probably because "'[t]he existence of a duty is a question of law for the court' [citation]. So is the interpretation of a written instrument where the interpretation does not turn on the credibility of extrinsic evidence." (*Allabach v. Santa Clara County Fair Assn., Inc.* (1996) 46 Cal.App.4th 1007, 1011.)

There may be contract law defenses (such as fraud, lack of consideration, duress, unconscionability) that could be asserted by the plaintiff to contest the validity of a waiver. If these defenses were to be considered by a jury, then an instruction on express assumption of the risk would probably be necessary.

### SOURCES AND AUTHORITY

- "Express assumption occurs when the plaintiff, in advance, expressly consents … to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. … The result is that … being under no duty, [the defendant] cannot be charged with negligence." (*Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 764 (internal citations omitted).)

- "[C]ases involving express assumption of risk are concerned with instances in which, as the result of an express agreement, the defendant owes no duty to protect the plaintiff from an injury-causing risk. Thus in this respect express assumption of risk properly can be viewed as analogous to primary assumption of risk." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308–309, fn. 4.)

- A release may also bar a wrongful death action, depending on the circumstances and terms of an agreement. (See *Coates v. Newhall Land and Farming, Inc.* (1987) 191 Cal.App.3d 1, 7–8.)

- Valid waivers will be upheld provided that they are not contrary to the "public interest." (*Tunkl v. Regents of Univ. of California* (1963) 60 Cal.2d 92, 101.)

- "To be valid and enforceable, a written release exculpating a tortfeasor from liability for future negligence or misconduct must be clear, unambiguous and explicit in expressing the intent of the parties. … Whether a contract provision is clear and unambiguous is a question of law, not of fact." (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598.)

- Restatement Second of Torts, section 496B, provides: "A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent … conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy."

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 1107, pp. 519–520
- California Tort Guide (Cont.Ed.Bar 1996) § 1.44

## 352
## Sudden Emergency

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**[Name of plaintiff/defendant] claims that [he/she] was not negligent because [he/she] acted with reasonable care in an emergency situation. [Name of plaintiff/defendant] was not negligent if [name of plaintiff/defendant] proves all the following:**

1. **That there was a sudden and unexpected emergency situation in which someone was in actual or apparent danger of immediate injury;**

2. **That [name of plaintiff/defendant] did not cause the emergency; and**

3. **That [name of plaintiff/defendant] acted as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer.**

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### DIRECTIONS FOR USE

The instruction should not be given unless at least two courses of action are available to the party after the danger is perceived. (*Anderson v. Latimer* (1985) 166 Cal.App.3d 667, 675.)

Additional instructions should be given if there are alternate theories of negligence.

### SOURCES AND AUTHORITY

- The doctrine of imminent peril may be used by either the plaintiff or the defendant, or, in a proper case, both. (*Smith v. Johe* (1957) 154 Cal.App.2d 508, 511–512.)

- "Whether the conditions for application of the imminent peril doctrine exist is itself a question of fact to be submitted to the jury." (*Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 37; *Leo v. Dunham* (1953) 41 Cal.2d 712, 715.)

- "[A] person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments." (*Leo, supra,* 41 Cal.2d at p. 714.)

- The doctrine "is properly applied only in cases where an unexpected physical danger is so suddenly presented as to deprive the injured party [or the defendant] of his power of using reasonable judgment." (*Sadoian v. Modesto Refrigerating Co.* (1958) 157 Cal.App.2d 266, 274.) The exigent nature of the circumstances effectively lowers the standard of care: " 'The test is whether the actor took one of the courses of action which a standard man in that emergency might have taken, and such a course is not negligent even though it led to an injury which might have been prevented by adopting an alternative course of action.' [Citation.]" (*Schultz v. Mathias* (1970) 3 Cal.App.3d 904, 912–913.)

- The doctrine of imminent peril does not apply to a person whose conduct causes or contributes to the imminent peril. (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 216.) However, the doctrine applies when a person perceives danger to himself as well as when he or she perceives a danger to others. (*Damele, supra,* 219 Cal.App.3d at p. 36.)

- "[T]he mere appearance of an imminent peril to others—not an actual imminent peril—is all that is required." (*Damele, supra,* 219 Cal.App.3d at p. 37.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) §§ 757–758
- California Tort Guide (Cont.Ed.Bar 1996) § 4.7

## 353
## Rescue

**[Name of plaintiff] claims that [he/she] was not responsible for [his/her] own injury because [he/she] was attempting to rescue a person who was placed in danger as a result of [name of defendant]'s negligence.**

**[Name of plaintiff] is not responsible for his/her own injuries if [name of plaintiff] proves all of the following:**

1. **That there was an emergency situation in which someone was in actual or apparent danger of immediate injury;**

2. **That the emergency was created by [name of defendant]'s negligence; and**

3. **That [name of plaintiff] acted reasonably when [he/she] attempted to rescue the victim.**

### SOURCES AND AUTHORITY

- In *Solgaard v. Guy F. Atkinson Co.* (1971) 6 Cal.3d 361, the Court stated the rescue doctrine as follows: "The cases have developed the rule that persons injured in the course of undertaking a necessary rescue may, absent rash or reckless conduct on their part, recover from the person whose negligence created the peril which necessitated the rescue." (*Id.* at p. 368.) The Court found that a doctor, who was injured while attempting to rescue two injured workers, was "entitled to the benefits of the rescue doctrine, including an instruction to the jury that as a rescuer, plaintiff could recover on the basis of defendant's negligence to [the victims], if plaintiff's injury was a proximate result thereof, and if plaintiff acted neither rashly nor recklessly under the circumstances." (*Id.* at p. 369.)

- Before *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, the rescue doctrine helped plaintiffs establish duty and was also a defense to the former bar of contributory negligence. (*Solgaard, supra,* 6 Cal.3d at p. 369.) The rescue doctrine may still be a viable counter to a charge of contributory negligence.

- In *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, the Court observed that "a person is not contributorily negligent who, with due care, encounters the risk created by the defendant's negligence in order to perform a rescue necessitated by that negligence." (*Id.* at p. 537.) This observation was not essential to the holding of the case, which focused on the issue of duty. Nevertheless, it suggests that the rescue doctrine may still play a role in determining whether or not the plaintiff was at fault.

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) §§ 1061–1063
- California Tort Guide (Cont.Ed.Bar 1996) § 1.41

# 400
# Issues in the Case

*Please see Instruction 300,* Issues in the Case (Negligence)

## DIRECTIONS FOR USE

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph of instruction 300.

## SOURCES AND AUTHORITY

- From a theoretical standpoint, "medical negligence" is still considered "negligence": "With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional 'circumstances' relevant to an overall assessment of what constitutes 'ordinary prudence' in a particular situation." (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997–998.)

  Accordingly, "[s]ince the standard of care remains constant in terms of 'ordinary prudence,' it is clear that denominating a cause of action as one for 'professional negligence' does not transmute its underlying character. For substantive purposes, it merely serves to establish the basis by which 'ordinary prudence' will be calculated and the defendant's conduct evaluated." (*Flowers, supra,* 8 Cal.4th at p. 998.)

- The distinction between "professional" as opposed to "ordinary" negligence is relevant in relation to certain statutory provisions such as the statute of limitations and Medical Injury Compensation Reform Act (MICRA). (*Flowers, supra,* at pp. 998–999.)

- Code of Civil Procedure section 340.5, which sets the statute of limitations for medical malpractice cases based on professional negligence, and Civil Code sections 3333.1 and 3333.2 (MICRA) define "professional negligence" as "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is

licensed and which are not within any restriction imposed by the licensing agency or licensed hospital."

- The statutory definition of "professional negligence" "focuses on whether the negligence occurs in the rendering of professional services, rather than whether a high or low level of skill is required. [Citation.]" (*Bellamy v. Appellate Dept. of the Superior Court* (1996) 50 Cal.App.4th 797, 807.)

- A formal physician-patient relationship is not always a prerequisite to bringing a malpractice action: "[E]ven in the absence of a physician-patient relationship, a physician has liability to an examinee for negligence or professional malpractice for injuries incurred during the examination itself." (*Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1478.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 774–777
- California Tort Guide (Cont.Ed.Bar 1996) § 9.65

## 401
## Standard of Care for HealthCare Professionals

**A [insert type of professional] is negligent if [he/she] fails to exercise the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [insert type of professionals] would possess and use in similar circumstances.**

**[When you are deciding if [name of defendant] was negligent, you must base your decision only on the statements of the expert witnesses who have testified in this case.]**

### DIRECTIONS FOR USE

This instruction is intended to apply to nonspecialist physicians, surgeons, and dentists. The standards of care for nurses, specialists, and hospitals are addressed in separate instructions.

The second paragraph should be used only if the court determines that expert testimony is necessary to establish the standard of care.

See instructions 218–220 on evaluating the credibility of expert witnesses.

### SOURCES AND AUTHORITY

- "With unimportant variations in phrasing, we have consistently held that a physician is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances." (*Landeros v. Flood* (1976) 17 Cal.3d 399, 408; see also *Brown v. Colm* (1974) 11 Cal.3d 639, 642–643.)

- "The courts require only that physicians and surgeons exercise in diagnosis and treatment that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36.)

- In *Hinson v. Clairmont Community Hospital* (1990) 218 Cal.App.3d 1110, 1119–1120 (disapproved on other grounds in *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1228), the court observed that failure to possess the requisite level of knowledge and skill is negligence, although a breach of this portion of the standard of care does not, by itself, establish actionable malpractice.

- In most cases, the standard of care is based on expert testimony: "The standard of care against which the acts of a medical practitioner are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of laymen." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215.)

- "California decisions state that the common knowledge exception applies if the medical facts are commonly susceptible of comprehension by a lay juror—that is, if the jury is capable of appreciating and evaluating the significance of a particular medical event." (*Gannon v. Elliot* (1994) 19 Cal.App.4th 1, 6.)

- The medical malpractice standard of care applies to veterinarians. (*Williamson v. Prida* (1999) 75 Cal.App.4th 1417, 1425.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) §§ 774, 792
- California Tort Guide (Cont.Ed.Bar 1996) § 9.1

## 402
## Standard of Care for Medical Specialists

**A [insert type of medical specialist] is negligent if [he/she] fails to exercise the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [insert type of medical specialists] would possess and use in similar circumstances.**

**[When you are deciding if [name of defendant] was negligent, you must base your decision only on the statements of the expert witnesses who have testified in this case.]**

### DIRECTIONS FOR USE

This instruction is intended to apply to physicians, surgeons, and dentists who are specialists in a particular practice area.

The second paragraph should be used only if the court determines that expert testimony is necessary to establish the standard of care.

See instructions 218–220 on evaluating the credibility of expert witnesses.

### SOURCES AND AUTHORITY

- Specialists, such as anesthesiologists and ophthalmologists, are "held to that standard of learning and skill normally possessed by such specialists in the same or similar locality under the same or similar circumstances." (*Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, 159–160.) This standard adds a further level to the general standard of care for medical professionals: "In the first place, the special obligation of the professional is exemplified by his duty not merely to perform his work with ordinary care but to use the skill, prudence, and diligence commonly exercised by practitioners of his profession. If he further specializes within the profession, he must meet the standards of knowledge and skill of such specialists." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188.)

- California imposes a "higher standard of care upon physicians with a specialized practice." (*Neel, supra,* 6 Cal.3d 176 at p. 188, fn. 22.) This higher standard refers to

the level of skill that must be exercised, not to the standard of care. (*Valentine v. Kaiser Foundation Hospitals* (1961) 194 Cal.App.2d 282, 294 (disapproved on other grounds by *Siverson v. Weber* (1962) 57 Cal.2d 834, 839).)

- Psychotherapists are considered specialists in their field. (*Tarasoff v. Regents of Univ. of California* (1976) 17 Cal.3d 425, 438; *Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 505.)

Secondary Sources

- California Tort Guide (Cont.Ed.Bar 1996) § 9.2

## 403
## Psychotherapist's Duty to Warn

**[Name of plaintiff] claims that [name of defendant] was negligent because [name of defendant] did not warn [name of plaintiff] or a law enforcement agency about [name of third party]'s threat of violent behavior. To succeed on this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of defendant] was a psychotherapist;**

2. **That [name of third party] was [name of defendant]'s patient;**

3. **That [name of third party] communicated a serious threat of physical violence to [name of defendant];**

4. **That [name of defendant] knew or should have known that [name of plaintiff] was [name of third party]'s intended victim; and**

5. **That [name of defendant] did not make reasonable efforts to warn [name of plaintiff] and a law enforcement agency about the threat.**

## SOURCES AND AUTHORITY

- Civil Code section 43.92 provides:

> (a) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.
>
> (b) If there is a duty to warn and protect under the limited circumstances specified above, the duty shall be discharged by the psychotherapist making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.

- Civil Code section 43.92 was enacted to limit the liability of psychotherapists under *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, regarding a therapist's duty to warn an intended victim. (*Barry v. Turek* (1990) 218 Cal.App.3d 1241, 1244–1245.) Under this provision, "[p]sychotherapists thus have immunity from *Tarasoff* claims except where the plaintiff proves that the patient has communicated to his or her psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." (*Id*. at p. 1245.)

- Failure to inform a law enforcement agency concerning a homicidal threat made by a patient against his work supervisor did not abrogate the "firefighter's rule" and, therefore, did not render the psychiatrist liable to a police officer who was subsequently shot by the patient. (*Tilley v. Schulte* (1999) 70 Cal.App.4th 79, 85–86.)

## 404
## Standard of Care for Nurses

**A [insert type of nurse] is negligent if [he/she] fails to exercise the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [insert type of nurses] would possess and use in similar circumstances.**

**[When you are deciding if [name of defendant] was negligent, you must base your decision only on the statements of the expert witnesses who have testified in this case.]**

### DIRECTIONS FOR USE

The appropriate level of nurse should be inserted where indicated—i.e., registered nurse, licensed vocational nurse, nurse practitioner: "Today's nurses are held to strict professional standards of knowledge and performance, although there are still varying levels of competence relating to education and experience." (*Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 342.)

The second paragraph should be used only if the court determines that expert testimony is necessary to establish the standard of care.

### SOURCES AND AUTHORITY

- "The adequacy of a nurse's performance is tested with reference to the performance of the other nurses, just as is the case with doctors." (*Fraijo, supra,* 99 Cal.App.3d at p. 341.)

- Courts have held that "a nurse's conduct must not be measured by the standard of care required of a physician or surgeon, but by that of other nurses in the same or similar locality and under similar circumstances." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215.)

- The jury should not be instructed that the standard of care for a nurse practitioner must be measured by the standard of care for a physician or surgeon when the nurse is examining a patient or making a diagnosis. (*Fein v. Permanente Medical Group*

(1985) 38 Cal.3d 137, 150.) Courts have observed that nurses are trained, "but to a lesser degree than a physician, in the recognition of the symptoms of diseases and injuries." (*Cooper v. National Motor Bearing Co.* (1955) 136 Cal.App.2d 229, 237–238.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 804, p. 155
- California Tort Guide (Cont.Ed.Bar 1996) § 9.52

## 405
## Success Not Required

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**[Insert type of medical practitioners] are not necessarily negligent just because their efforts are unsuccessful.**

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### SOURCES AND AUTHORITY

- "The 'law has never held a physician or surgeon liable for every untoward result which may occur in medical practice' but it 'demands only that a physician or surgeon have the degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same locality and that he exercise ordinary care in applying such learning and skill to the treatment of his patient.' " (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 473 [internal citations omitted].)

- It is appropriate to instruct a jury that "they do not necessarily adjudge whether there was negligence in terms of the result achieved… ." (*Dincau v. Tamayose* (1982) 131 Cal.App.3d 780, 800.)

- "[A] physician and surgeon is not required to make a perfect diagnosis but is only required to have that degree of skill and learning ordinarily possessed by physicians of good standing practicing in the same locality and to use ordinary care and diligence in applying that learning to the treatment of his patient." (*Ries v. Reinard* (1941) 47 Cal.App.2d 116, 119.)

- "A doctor is not a warrantor of cures nor is he required to guarantee results and in the absence of a want of reasonable care and skill will not be held responsible for untoward results. (*Sanchez v. Rodriguez* (1964) 226 Cal.App.2d 439, 448.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 774, pp. 113–114
- California Tort Guide (Cont.Ed.Bar 1996) § 9.18

## 406
## Error in Medical Judgment

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**A [insert type of medical practitioner] is not necessarily negligent just because he or she makes a mistake. A mistake is negligence only if the [insert type of medical practitioner] was not as skillful, knowledgeable, or careful as other [insert name of medical practitioners] would have been in similar circumstances.**

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### DIRECTIONS FOR USE

Plaintiffs have argued that this type of instruction "provides too easy an 'out' for malpractice defendants." (*Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 343.) Nevertheless, in California, instructions on this point have been sustained when challenged. (*Rainer v. Buena Community Memorial Hospital* (1971) 18 Cal.App.3d 240, 260.)

### SOURCES AND AUTHORITY

- "While a physician cannot be held liable for mere errors of judgment or for erroneous conclusions on matters of opinion, he must use the judgment and form the opinions of one possessed of knowledge and skill common to medical men practicing in the same or like community, and that he may have done his best is no answer to an action of this sort." (*Sim v. Weeks* (1935) 7 Cal.App.2d 28, 36.)

- In *Burns v. American Casualty Co.* (1954) 127 Cal.App.2d 198, 203, the court disagreed with the contention that "'malpractice, error or mistake' constitute an 'oratorical triad' meaning 'malpractice' as that term is commonly understood." The court observed that " 'malpractice' has a somewhat narrow meaning, namely, the failure of the one charged with malpractice to exercise diligence, care and skill, such as ordinarily possessed by the members of his profession. Thus a physician may err or make a mistake without necessarily being guilty of malpractice." (*Ibid*.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) § 774, pp. 113–114
- California Tort Guide (Cont.Ed.Bar 1996) § 9.5

## 407
## Alternative Methods of Care

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**A [insert type of medical practitioner] is not necessarily negligent just because [he/she] chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been the better choice.**

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### SOURCES AND AUTHORITY

- "A difference of medical opinion concerning the desirability of one particular medical procedure over another does not … establish that the determination to use one of the procedures was negligent." (*Clemens v. Regents of Univ. of California* (1970) 8 Cal.App.3d 1, 13.)

- "Medicine is not a field of absolutes. There is not ordinarily only one correct route to be followed at any given time. There is always the need for professional judgment as to what course of conduct would be most appropriate with regard to the patient's condition." (*Barton v. Owen* (1977) 71 Cal.App.3d 484, 501–502.)

- This type of instruction may be important in arriving at a fair decision: "[I]n determining whether defendants breached a standard of care owed decedent, the jury may not engage in 'but for' reasoning." (*Meier v. Ross General Hospital* (1968) 69 Cal.2d 420, 435.)

## 408
## Duty to Warn Patient

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**[Name of plaintiff] claims that [name of defendant] was negligent because [name of defendant] did not warn [name of patient] that [his/her] condition presented a danger to others.**

**[Name of defendant] was negligent if [name of plaintiff] proves that [name of defendant] did not take reasonable steps to warn [name of patient] that [his/her] condition presented a danger to others.**

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### DIRECTIONS FOR USE

This instruction is intended to cover situations where a patient's condition foreseeably causes harm to a third party.

### SOURCES AND AUTHORITY

- "To avoid liability in this case, [defendants] should have taken whatever steps were reasonable under the circumstances to protect [plaintiff] and other foreseeable victims of [patient]'s conduct. What is a reasonable step to take will vary from case to case." (*Myers v. Quesenberry* (1983) 144 Cal.App.3d 888, 894 [internal citations omitted].) "Our holding does not require the physician to do anything other than what he was already obligated to do for the protection of the patient. Thus, even though it may appear that the scope of liability has been expanded to include injuries to foreseeable victims other than the patient, the standard of medical care to the patient remains the same." (*Ibid*.)

- "When the avoidance of foreseeable harm to a third person requires a defendant to control the conduct of a person with whom the defendant has a special relationship (such as physician and patient) or to warn the person of the risks involved in certain conduct, the defendant's duty extends to a third person with whom the defendant does not have a special relationship." (*Reisner v. Regents of Univ. of California* (1995) 31 Cal.App.4th 1195, 1198–1199 [infected sex partner could maintain action against his girlfriend's physicians for failing to tell the woman that she had received HIV-tainted blood].)

- Proof of causation is still required: "[Defendants] will be liable only if [plaintiff] is able to prove their failure to warn [patient] not to drive in an irrational and uncontrolled diabetic condition was a substantial factor in causing his injuries." (*Myers, supra,* 144 Cal.App.3d at p. 895.)

- This obligation to third parties appears to be limited to healthcare professionals and does not apply to ordinary citizens. (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1456–1457.)

## 409
## Duty to Refer to a Specialist

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**If a reasonably careful [insert type of medical practitioner] in the same situation would have consulted with or referred [name of patient] to a [insert type of medical specialist], then [name of defendant] is negligent if [he/she] did not do so.**

**However, if [name of defendant] treated [name of patient] with as much skill and care as a [insert type of medical specialist] would have, then [name of defendant] was not negligent.**

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### SOURCES AND AUTHORITY

- Physicians who elect to treat patients even though a specialist should have been consulted will be held to the standard of care of that specialist. If the physician meets the higher standard of care, he or she is not negligent. (*Simone v. Sabo* (1951) 37 Cal.2d 253, 257.)

- The Supreme Court acknowledged and approved of the following instruction which was given in a New York case: "If under the circumstances a reasonably careful skillful general practitioner … would have suggested the calling into consultation of a … specialist, the defendant was negligent for failing to do so." (*Sinz v. Owens* (1949) 33 Cal.2d 749, 758–759.) Presumably this principle would also apply if a specialist failed to consult another appropriate type of specialist.

- If the evidence establishes that the failure of a nurse to consult the attending physician under the circumstances presented in the case is not in accord with the standard of care of the nursing profession, this instruction may be applicable. (*Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 344.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 774, pp. 113–114
- California Tort Guide (Cont.Ed.Bar 1996) § 9.6

## 410
## Abandonment of Patient

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**[Name of plaintiff] claims [name of defendant] was negligent because [he/she] did not give [name of patient] enough notice before withdrawing from the case. To succeed, [name of plaintiff] must prove both of the following:**

1. **That [name of defendant] withdrew from [name of patient]'s care and treatment; and**

2. **That [name of defendant] did not provide sufficient notice for [name of patient] to obtain another doctor.**

**However, [name of defendant] is not negligent if [name of defendant] proves that [name of patient] consented to the withdrawal or declined further medical care.**

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### SOURCES AND AUTHORITY

- As a general proposition, "a physician who abandons a patient may do so 'only … after due notice, and an ample opportunity afforded to secure the presence of other medical attendance.' [Citation.]" (*Payton v. Weaver* (1982) 131 Cal.App.3d 38, 44.)

- "A physician cannot just walk away from a patient after accepting the patient for treatment. … In the absence of the patient's consent, the physician must notify the patient he is withdrawing and allow ample opportunity to secure the presence of another physician." (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1138.)

- "When a competent, informed adult directs the withholding or withdrawal of medical treatment, even at the risk of hastening or causing death, medical professionals who respect that determination will not incur criminal or civil liability: the patient's decision discharges the physician's duty." (*Thor v. Superior Court* (1993) 5 Cal.4th 725, 743.)

Secondary Sources

- California Tort Guide (Cont.Ed.Bar 1996) § 9.8

## 411
## Derivative Liability of Surgeon

**A surgeon can be held responsible for the negligence of other medical practitioners or nurses who are assisting [him/her] during an operation if the surgeon has direct control over how they perform their duties, or if [he/she] provides direction over the particular function that is carried out negligently.**

### SOURCES AND AUTHORITY

- The "captain of the ship" doctrine is a "special application of the borrowed-servant rule that has developed in medical malpractice cases on the theory that the surgeon is in complete control of all activities in the operating room." (*Truhitte v. French Hospital* (1982) 128 Cal.App.3d 332, 348.) The doctrine was first adopted by the California Supreme Court in *Ales v. Ryan* (1936) 8 Cal.2d 82, 104.

- Absent evidence of right to control, an operating surgeon is generally not responsible for the conduct of anesthesiologists or others who independently carry out their duties. (*Seneris v. Haas* (1955) 45 Cal.2d 811, 828; *Marvulli v. Elshire* (1972) 27 Cal.3d 180, 187.)

- While the "captain of the ship" doctrine has never been expressly rejected, it has been eroded by modern courts: "A theory that the surgeon directly controls all activities of whatever nature in the operating room certainly is not realistic in present day medical care." (*Truhitte, supra,* 128 Cal.App.3d at p. 348.)

- This doctrine applies only to medical personnel who are actively participating in the surgical procedure. (*Thomas v. Intermedics Orthopedics, Inc.* (1996) 47 Cal.App.4th 957, 969.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1999 supp.) Torts, § 795, p. 60
- California Tort Guide (Cont.Ed.Bar 1996) § 9.4

## 412
## Wrongful Birth—Sterilization/Abortion

**[Name of plaintiff] claims that [name of defendant] negligently failed to prevent the birth of [name of plaintiff]'s child. To succeed on this claim, [name of plaintiff] must prove both of the following:**

1. **That [name of defendant] performed a negligent [sterilization] [abortion] procedure; and**

2. **That [name of plaintiff] gave birth to an unplanned child after this procedure was performed.**

### DIRECTIONS FOR USE

The general medical negligence instructions—instructions on the standard of care, and causation—could be used in conjunction with this one.

### SOURCES AND AUTHORITY

- "California law now permits a mother to hold medical personnel liable for their negligent failure to prevent or to terminate a pregnancy." (*Foy v. Greenblott* (1983) 141 Cal.App.3d 1, 8.)

- Negligent sterilization procedure that leads to the birth of a child, either normal or disabled, can form the basis of a wrongful birth action. (*Custodio v. Bauer* (1967) 251 Cal.App.2d 303, 323–325; *Morris v. Frudenfeld* (1982) 135 Cal.App.3d 23, 37.) The same is true of an unsuccessful abortion procedure. (*Stills v. Gratton* (1976) 55 Cal.App.3d 698, 707–708.)

- A wrongful birth claim based on a negligently performed sterilization or abortion procedure does not support an action for wrongful life: "California courts do recognize a wrongful life claim by an 'impaired' child for special damages (but not for general damages), when the physician's negligence is the proximate cause of the child's need for extraordinary medical care and training. No court, however, has expanded tort liability to include wrongful life claims by children born without any

mental or physical impairment." (*Alexandria S. v. Pacific Fertility Medical Center* (1997) 55 Cal.App.4th 110, 122.)

- Civil Code section 43.6(b) provides: "The failure or refusal of a parent to prevent the live birth of his or her child shall not be a defense in any action against a third party, nor shall the failure or refusal be considered in awarding damages in any such action."

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 796, pp. 141–142
- California Tort Guide (Cont.Ed.Bar 1996) § 9.22

## 413
## Wrongful Birth—Genetic Testing

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**[Name of plaintiff] claims that [name of defendant] was negligent because [he/she] failed to inform [name of plaintiff] of the risk that [he/she] would have a [genetically impaired/disabled] child. In order for [name of plaintiff] to succeed on this claim, [name of plaintiff] must prove each of the following:**

1. **That [name of defendant] negligently failed to diagnose and warn [name of plaintiff] that [name of infant] would probably be born with [a genetic impairment/disability]; and**

2. **That [name of infant] was born with a [genetic impairment/ disability]; and**

3. **That if [name of plaintiff] had known of the [genetic impairment/ disability], she would not have conceived [name of infant] [or would not have carried the baby to term]; and**

4. **That [name of plaintiff] will have to pay extraordinary expenses to care for [name of infant].**

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### DIRECTIONS FOR USE

The general medical negligence instructions—instructions on the standard of care, and causation—could be used in conjunction with this one.

### SOURCES AND AUTHORITY

- "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883.) Since the wrongful life action corresponds to the wrongful birth action, it is reasonable to conclude that this principle applies to wrongful birth actions.

- Regarding wrongful life actions, courts have observed: "[A]s in any medical malpractice action, the plaintiff must establish: '(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.' [Citation.]" (*Gami, supra*, 18 Cal.App.4th at p. 877.)

- Both parent and child may recover damages to compensate for "the extraordinary expenses necessary to treat the hereditary ailment." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 239.)

- In wrongful birth actions, parents are permitted to recover the medical expenses incurred on behalf of a disabled child. (*Turpin, supra,* 31 Cal.3d at p. 238.) Such children can also recover medical expenses in a wrongful life action, though both parent and child may not recover the same expenses. (*Ibid*.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 797–800
- California Tort Guide (Cont.Ed.Bar 1996) §§ 9.21–9.22

## 414
## Wrongful Life

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**[Name of plaintiff] claims that [name of defendant] was negligent because [he/she] failed to inform [name of plaintiff]'s parents of the risk that [name of plaintiff] would be [genetically impaired/disabled]. To succeed, [name of plaintiff] must prove all of the following:**

1. **That [name of defendant] negligently failed to diagnose and warn [name of plaintiff]'s parents that their child would probably be born with a [genetic impairment/disability];**

2. **That [name of plaintiff] was born with a [genetic impairment/ disability];**

3. **That if [name of plaintiff]'s parents had known of the hereditary ailment or disability, they would not have conceived [name of plaintiff] [or would not have carried the baby to term]; and**

4. **That [name of plaintiff] will have to pay extraordinary medical or training expenses because of [his/her] [genetic impairment/disability].**

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### DIRECTIONS FOR USE

In order for this instruction to apply, the genetic impairment must result in a physical or mental disability. This is implied by the fourth element in the instruction.

The general medical negligence instructions—instructions on the standard of care, and causation—could be used in conjunction with this one.

### SOURCES AND AUTHORITY

- "[I]t may be helpful to recognize that although the cause of action at issue has attracted a special name —'wrongful life'— plaintiff's basic contention is that her action is simply one form of the familiar medical or professional malpractice action.

The gist of plaintiff's claim is that she has suffered harm or damage as a result of defendants' negligent performance of their professional tasks, and that, as a consequence, she is entitled to recover under generally applicable common law tort principles." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 229.)

- "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikan Medical Center* (1993) 18 Cal.App.4th 870, 883.)

- General damages are not available: "[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child — like his or her parents— may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment." (*Turpin, supra,* 31 Cal.3d at p. 239.)

- A child may not recover for loss of earning capacity in a wrongful life action. (*Andalon v. Superior Court* (1984) 162 Cal.App.3d 600, 614.)

- The negligent failure to administer a test that had only a twenty-percent chance of detecting a genetic abnormality did not establish a reasonably probable causal connection to the birth of a child with Down's Syndrome. (*Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696.)

- Wrongful life does not apply to normal children. (*Alexandria S. v. Pacific Fertility Medical Center* (1997) 55 Cal.App.4th 110, 122.)

- Civil Code section 43.6 (a) provides: "No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive."

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 797–800
- California Tort Guide (Cont.Ed.Bar 1996) §§ 9.21–9.22

## 415
## Duty of Hospital

**A hospital is negligent if it does not use reasonable care toward its patients. A hospital must provide procedures, policies, facilities, supplies, and qualified personnel reasonably necessary for the treatment of its patients.**

### DIRECTIONS FOR USE

This instruction may be augmented by 416, *Duty of Hospital to Provide Safe Environment*, and/or 417, *Duty of Hospital to Screen Medical Staff.*

### SOURCES AND AUTHORITY

- The amount of care that a hospital must exercise toward a patient varies depending on the patient's condition: "[T]he duty imposed by law on the hospital is that it must exercise such reasonable care toward a patient as his mental and physical condition, if known, require." (*Vistica v. Presbyterian Hospital and Medical Center* (1967) 67 Cal.2d 465, 469.)

- A hospital has a duty "to use reasonable care and diligence in safeguarding a patient committed to its charge [citations] and such care and diligence are measured by the capacity of the patient to care for himself." (*Thomas v. Seaside Memorial Hospital* (1947) 80 Cal.App.2d 841, 847.)

- A hospital's duty extends to both treatment and care: "It is the duty of any hospital that undertakes the treatment of an ill or wounded person to use reasonable care and diligence not only in operating upon and treating but also in safeguarding him, and such care and diligence is measured by the capacity of the patient to care for himself." (*Valentin v. La Societe Francaise De Bienfaisance Mutuelle De Los Angeles* (1946) 76 Cal.App.2d 1, 4.)

- Hospitals must maintain safe conditions on their premises: "The professional duty of a hospital … is primarily to provide a safe environment within which diagnosis, treatment, and recovery can be carried out. Thus if an unsafe condition of the

hospital's premises causes injury to a patient … there is a breach of the hospital's duty qua hospital." (*Murillo v. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50, 56–57.)

- Hospitals must monitor a patient's condition: "Defendant . . . was under a duty to observe and know the condition of a patient. Its business is caring for ill persons, and its conduct must be in accordance with that of a person of ordinary prudence under the circumstances, a vital part of those circumstances being the illness of the patient and incidents thereof." (*Rice v. California Lutheran Hospital* (1945) 27 Cal.2d 296, 302.)

- "If a hospital is obliged to maintain its premises and its instrumentalities for the comfort of its patients with such care and diligence as will reasonably assure their safety, it should be equally bound to observe the progress of a patient in his recovery from a major operation with such care and diligence as his condition reasonably requires for his comfort and safety and promptly to employ such agencies as may reasonably appear necessary for the patient's safety." (*Valentin, supra,* 76 Cal.App.2d at p. 5.)

- A hospital has a duty to provide sufficient staff: "No expert opinion is required to prove the hospital's failure to provide an adequate number of trained, qualified personnel at the most critical time in postoperative care was negligent." (*Czubinsky v. Doctors Hospital* (1983) 139 Cal.App.3d 361, 367.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 801–803
- California Tort Guide (Cont.Ed.Bar 1996) §§ 9.55–9.64

## 416
## Duty of Hospital to Provide Safe Environment

**If [name of defendant hospital] knew or reasonably should have known it was likely that [name of patient] would harm [himself/ herself/another], then [name of defendant hospital] had to use reasonable care to prevent such harm.**

### DIRECTIONS FOR USE

Always read 415, *Duty of Hospital*, in conjunction with this instruction.

### SOURCES AND AUTHORITY

- "[T]he duty extends to safeguarding the patient from dangers due to mental incapacity; and where the hospital has notice or knowledge of facts from which it might reasonably be concluded that a patient would be likely to harm himself or others unless preclusive measures were taken, then the hospital must use reasonable care in the circumstances to prevent such harm." (*Vistica v. Presbyterian Hospital and Medical Center* (1967) 67 Cal.2d 465, 469.)

- In *Meier v. Ross Gen. Hospital* (1968) 69 Cal.2d 420, 423–424, the Court held that absent reasonable care, the treating doctor and the hospital can be liable even though a suicidal patient's acts are "voluntary." That is, the doctor and the hospital must use reasonable care to prevent the patient from harming herself by her own acts, be they voluntary or involuntary.

- For duty of a hospital that cares for alcoholics see *Wood v. Samaritan Inst.* (1945) 26 Cal.2d 847, 853, and *Emerick v. Raleigh Hills Hospital* (1982) 133 Cal.App.3d 575, 581.

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 801–803
- California Tort Guide (Cont.Ed.Bar 1996) §§ 9.55–9.62

## 417
## Duty of Hospital to Screen Medical Staff

**A hospital is negligent if it does not use reasonable care to select and periodically evaluate its medical staff so that its patients are provided adequate medical care.**

### DIRECTIONS FOR USE

Always read instruction 415, *Duty of Hospital*, in conjunction with this instruction.

### SOURCES AND AUTHORITY

- "[W]e hold a hospital is accountable for negligently screening the competency of its medical staff to insure the adequacy of medical care rendered to patients at its facility." (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 346.)

- A hospital has a professional responsibility to ensure the competence of its medical staff through careful selection and periodic review. (*Bell v. Sharp Cabrillo Hospital* (1989) 212 Cal.App.3d 1034, 1050.)

- "The hospital has 'a direct and independent responsibility to its patients of insuring the competency of its medical staff and the quality of medical care provided....' [Citation.] Hospitals must be able to establish high standards of professional work and to maintain those standards through careful selection and review of staff. And they are required to do so by both state and federal law. [Citations.]" (*Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 489.)

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 801–803
- California Tort Guide (Cont.Ed.Bar 1996) §§ 9.55–9.62

## 418
## Patient's Duty to Provide for His or Her Own Well-Being

**A patient must use reasonable care to provide for his or her own well-being. This includes a responsibility to [follow a [insert type of medical practitioner]'s instructions] [seek medical assistance] when a reasonable person in the same situation would do so.**

**[Name of defendant] claims that [name of plaintiff]'s harm was caused, in whole or in part, by [name of plaintiff]'s negligence in failing to [follow [name of defendant]'s instructions] [seek medical assistance]. To succeed, [name of defendant] must prove all of the following:**

1. **That [name of plaintiff] did not use reasonable care in [following [name of defendant]'s instructions] [seeking medical assistance]; and**

2. **That [name of plaintiff]'s failure to [follow [name of defendant]'s instructions] [seek medical assistance] was a substantial factor in causing [name of plaintiff]'s harm.**

### DIRECTIONS FOR USE

It is error to give this type of instruction absent evidence that the patient was contributorily negligent. (*LeMons v. Regents of Univ. of California* (1978) 21 Cal.3d 869, 874.) At least one court has held that it is error to give this kind of instruction absent expert testimony that the plaintiff was negligent. (*Bolen v. Woo* (1979) 96 Cal.App.3d 944, 952.)

Read this instruction in conjunction with basic comparative fault and damages instructions (instructions 310, 311, and 312).

## SOURCES AND AUTHORITY

- The defendant has the burden of proving that the plaintiff was contributorily negligent and that this negligence was a cause of the harm. (*Maertins v. Kaiser Foundation Hospital* (1958) 162 Cal.App.2d 661, 666–667.)

- Mere refusal to follow instructions is not sufficient to show contributory negligence or failure to mitigate damages. The failure must be unreasonable. (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 422.)

- The issues of contributory negligence and mitigation of damages can become confused in cases involving a patient's failure to follow instructions. (*LeMons, supra,* 21 Cal.3d at pp. 874–875.) However, because contributory negligence is no longer a complete bar to recovery, the distinction may be less critical today.

Secondary Sources

- 6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 1382, pp. 852–853
- California Tort Guide (Cont.Ed.Bar 1996) § 9.66

## 430
## Medical Battery

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**A [insert type of medical practitioner] commits a battery if:**

**[He or she performs a medical procedure without the patient's informed consent.]**

**[The patient consents to one medical procedure, but the [insert type of medical practitioner] performs a substantially different medical procedure.]**

**[The patient consents to a medical procedure, but only on the condition that something else happens, and the [insert type of medical practitioner] proceeds even though that condition doesn't happen.]**

**A patient can consent to a medical procedure by words or conduct.**

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### DIRECTIONS FOR USE

One of the three bracketed options should be selected, depending on the nature of the case.

### SOURCES AND AUTHORITY

- A surgical operation performed without the patient's informed consent is a "technical battery." (*Berkey v. Anderson* (1969) 1 Cal.App.3d 790, 803.)

- Battery may also be found if a substantially different procedure is performed: "Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 239.)

- Battery may also be found if a conditional consent is violated: "[I]t is well-recognized a person may place conditions on [his or her] consent. If the actor exceeds the terms

or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 610.)

- "Confusion may arise in the area of 'exceeding a patient's consent.' In cases where a doctor exceeds the consent and such excess surgery is found necessary due to conditions arising during an operation which endanger the patient's health or life, the consent is presumed. The surgery necessitated is proper (though exceeding specific consent) on the theory of assumed consent, were the patient made aware of the additional need." (*Pedesky v. Bleiberg* (1967) 251 Cal.App.2d 119, 123.)

- "Consent to medical care, including surgery, may be express or may be implied from the circumstances." (*Bradford v. Winter* (1963) 215 Cal.App.2d 448, 454.)

- "It is elemental that consent may be manifested by acts or conduct and need not necessarily be shown by a writing or by express words. [Citations.]" (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 38–39.)

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 352–562
- California Tort Guide (Cont.Ed.Bar 1996) §§ 9.11–9.16

## 431
## Consent on Behalf of Another

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**In this case [name of patient] could not consent to [insert medical procedure] because [he/she] was [insert reason — e.g., a minor/ incompetent/unconscious]. In this situation, the law allows [name of authorized person] to give consent on behalf of [name of patient].**

**You must decide whether [name of authorized person] consented to the [insert medical procedure] performed on [name of patient].**

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### SOURCES AND AUTHORITY

- "If the patient is a minor or incompetent, the authority to consent is transferred to the patient's legal guardian or closest available relative." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 244; *Farber v. Olkon* (1953) 40 Cal.2d 503, 509.).)

- Family Code section 6910 provides: "The parent, guardian, or caregiver of a minor who is a relative of the minor and who may authorize medical care and dental care under Section 6550, may authorize in writing an adult into whose care a minor has been entrusted to consent to medical care or dental care, or both, for the minor."

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 353
- California Tort Guide (Cont.Ed.Bar 1996) § 9.16

## 432
## Informed Consent—Definition

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**A patient's consent to a medical procedure must be "informed." A patient gives an "informed consent" only after the [insert type of medical practitioner] has fully explained the [insert medical procedure.]**

**A [insert type of medical practitioner] must explain the likelihood of success and the risks of agreeing to or refusing a medical procedure in language that the patient can understand. A [insert type of medical practitioner] must give the patient as much information as [he/she] needs to make an informed decision. The patient must be told about any risk that a reasonable person would consider important in deciding to have or not to have a [insert medical procedure]. The patient must be told about any risk of death or serious injury or significant potential complications that may occur if the procedure is performed or refused. A [insert type of medical practitioner] is not required to explain minor risks that are not likely to occur.**

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### DIRECTIONS FOR USE

This instruction should be read in conjunction with instruction 433, *Failure to Obtain Informed Consent—Essential Factual Elements*.

If the patient is a minor or is incapacitated, tailor the instruction accordingly. Also, see instruction 431, *Consent on Behalf of Another*.

### SOURCES AND AUTHORITY

- A physician is required to disclose "all information relevant to a meaningful decisional process." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 242.)

- "When a doctor recommends a particular procedure then he or she must disclose to the patient all material information necessary to the decision to undergo the procedure, including a reasonable explanation of the procedure, its likelihood of success, the risks involved in accepting or rejecting the proposed procedure, and any

other information a skilled practitioner in good standing would disclose to the patient under the same or similar circumstances." (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 343.)

- "A physician has a duty to inform a patient in lay terms of the dangers inherently and potentially involved in a proposed treatment." (*McKinney v. Nash* (1981) 120 Cal.App.3d 428, 440.)

- Courts have observed that *Cobbs* created a two-part test for disclosure. "First, a physician must disclose to the patient the potential of death, serious harm, and other complications associated with a proposed procedure." (*Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1301.) "Second, '[b]eyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances.' " (*Id*. at p. 1302 (citation omitted).) The doctor has no duty to discuss minor risks inherent in common procedures, when it is common knowledge that such risks are of very low incidence. (*Cobbs, supra*, 8 Cal.3d at p. 244.)

- The courts have defined "material information" as follows: "Material information is that which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure. To be material, a fact must also be one which is not commonly appreciated. If the physician knows or should know of a patient's unique concerns or lack of familiarity with medical procedures, this may expand the scope of required disclosure." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 291 [internal citations omitted].)

- "Obviously involved in the equation of materiality are countervailing factors of the seriousness and remoteness of the dangers involved in the medical procedure as well as the risks of a decision not to undergo the procedure." (*McKinney, supra*, 120 Cal.App.3d at p. 441.)

- Expert testimony is not required to establish the duty to disclose the potential of death, serious harm, and other complications. (*Cobbs, supra*, 8 Cal.3d at p. 244.) Expert testimony is admissible to show what other information a skilled practitioner would have given under the circumstances. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1191–1192.)

- A physician must also disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his or her medical judgment. (*Moore v. Regents of Univ. of California* (1990) 51 Cal.3d 120, 129–132.)

- Appellate courts have rejected a general duty of disclosure concerning a treatment or procedure a physician does not recommend. However, in some cases, "there may be evidence that would support the conclusion that a doctor should have disclosed information concerning a nonrecommended procedure." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1071.)

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 360–361
- California Tort Guide (Cont.Ed.Bar 1996) § 9.11

## 433
## Failure to Obtain Informed Consent—Essential Factual Elements

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**[Name of plaintiff] claims that [name of defendant] was negligent because [name of defendant] performed a [insert medical procedure] on [name of plaintiff] without first obtaining [name of plaintiff]'s informed consent. To succeed on this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of defendant] performed a [insert medical procedure] on [name of plaintiff];**

2. **That [name of plaintiff] did not give [his/her] "informed consent" for the [insert medical procedure];**

3. **That a reasonable person in [name of plaintiff]'s position would not have agreed to the [insert medical procedure] if he or she had been fully informed of the results and risks of [and alternatives to] the [insert medical procedure]; and**

4. **That [name of plaintiff] was harmed by a result or risk that [name of defendant] should have explained before the [insert medical procedure] was performed.**

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### DIRECTIONS FOR USE

This instruction should be read in conjunction with instruction 432, *Informed Consent—Definition*.

If the patient is a minor or is incapacitated, tailor the instruction accordingly. Also, see instruction 431, *Consent on Behalf of Another*.

### SOURCES AND AUTHORITY

- A physician's duty of reasonable disclosure for purposes of consent to a proposed medical procedure was established in *Cobbs v. Grant* (1972) 8 Cal.3d 229.

- On causation: "There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given." (*Cobbs, supra,* 8 Cal.3d at p. 245.)

- A doctor generally does not have a duty to disclose information concerning non-recommended procedures. (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1071.) However, a doctor must make "such disclosures as are required for competent practice within the medical community." (*Ibid*.)

- The objective test is whether a reasonable person in plaintiff's position would have refused consent if he or she had been fully informed (*Cobbs, supra,* 8 Cal.3d at p. 245.) However, the defendant can seek to prove that this particular plaintiff still would have consented even if properly informed (as an affirmative defense.) (*Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1206.)

- "[A]n action for failure to obtain informed consent lies where 'an undisclosed inherent complication ... occurs,' not where a disclosed complication occurs." (*Warren, supra,* 57 Cal.App.4th at p. 1202 (citation omitted).)

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, §§ 359–362
- California Tort Guide (Cont.Ed.Bar 1996) § 9.11

## 434
## Informed Refusal—Definition

**A [insert type of medical practitioner] must explain the risks of refusing a procedure in language that the patient can understand. A [insert type of medical practitioner] must give the patient as much information as [he/she] needs to make an informed decision. The patient must be told about any risk that a reasonable person would consider important in deciding not to have a [insert medical procedure]. The patient must be told about any risk of death or serious injury or significant potential complications that may occur if the procedure is refused. A [insert type of medical practitioner] is not required to explain minor risks that are not likely to occur.**

### DIRECTIONS FOR USE

This instruction should be read in conjunction with instruction 435, *Risks of Nontreatment —Essential Factual Elements*. If the patient is a minor or is incapacitated, tailor the instruction accordingly. Also, see instruction 431, *Consent on Behalf of Another*.

### SOURCES AND AUTHORITY

- The definition of "informed consent" in *Cobbs v. Grant* (1972) 8 Cal.3d 229 applies "whether the procedure involves treatment or a diagnostic test." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 292.)

- In *Truman*, "the high court extended the duty to make disclosure to include recommended diagnostic as well as therapeutic procedures and to include situations in which the patient declines the recommended procedure." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1069.) This has been termed the "informed refusal" doctrine. (*Townsend v. Turk* (1990) 218 Cal.App.3d 278, 284.)

- "In a nutshell, a doctor has a duty to disclose all material information to his patient which will enable that patient to make an informed decision regarding the taking or refusal to take such a test." (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 736.)

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 361, pp. 447–449
- California Tort Guide (Cont.Ed.Bar 1996) § 9.12

## 435
## Risks of Nontreatment—Essential Factual Elements

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**[Name of plaintiff] claims that [name of defendant] was negligent because [name of defendant] did not fully inform [name of plaintiff] about the risks of refusing the [insert medical procedure]. To succeed on this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of defendant] did not perform the [insert medical procedure] on [name of plaintiff];**

2. **That [name of defendant] did not fully inform [name of plaintiff] about the risks of refusing the [insert medical procedure];**

3. **That a reasonable person in [name of plaintiff]'s position would have agreed to the [insert medical procedure] if he or she had been fully informed about these risks; and**

4. **That [name of plaintiff] was harmed by the failure to have the [insert medical procedure] performed.**

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### DIRECTIONS FOR USE

This instruction should be read in conjunction with instruction 434, *Informed Refusal—Definition*.

If the patient is a minor or is incapacitated, tailor the instruction accordingly. Also, see instruction 431, *Consent on Behalf of Another*.

### SOURCES AND AUTHORITY

- The definition of "informed consent" in *Cobbs v. Grant* (1972) 8 Cal.3d 229 applies "whether the procedure involves treatment or a diagnostic test." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 292.)

- In *Truman*, "the high court extended the duty to make disclosure to include recommended diagnostic as well as therapeutic procedures and to include situations in which the patient declines the recommended procedure." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1069.) This has been termed the "informed refusal" doctrine. (*Townsend v. Turk* (1990) 218 Cal.App.3d 278, 284.)

- "In a nutshell, a doctor has a duty to disclose all material information to his patient which will enable that patient to make an informed decision regarding the taking or refusal to take such a test." (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 736.)

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 361, pp. 447–449
- California Tort Guide (Cont.Ed.Bar 1996) § 9.12

## 436
## Defenses—Plaintiff Would Have Consented

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**[Name of defendant] claims that even if a reasonable person in [name of plaintiff]'s position might not have consented to the [insert medical procedure] if he or she had been given enough information about its risks, [name of plaintiff] still would have consented to the procedure.**

**If you decide [name of defendant] has proved that [name of plaintiff] would have consented, you must conclude that [name of defendant]'s failure to inform [name of plaintiff] of the risks was not a substantial factor in causing [name of plaintiff]'s harm.**

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### DIRECTIONS FOR USE

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.)

This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that even if the plaintiff had known of the risks of refusal, he or she still would have refused the test.

### SOURCES AND AUTHORITY

- The objective test is whether a reasonable person in plaintiff's position would have refused consent if he or she had been fully informed. (*Cobbs, supra,* 8 Cal.3d at p. 245.) However, the defendant can seek to prove that this particular plaintiff still would have consented even if properly informed (as an affirmative defense). (*Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1206.)

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1987) Torts,§ 362, p. 449
- California Tort Guide (Cont.Ed.Bar 1996) § 9.11

## 437
## Defenses—Waiver

**[Name of defendant] claims that [he/she] did not have to inform [name of patient] of the risks of the [insert medical procedure] because [name of patient] asked not to be told of the risks.**

**If [name of defendant] has proved that [name of patient] told [name of defendant] that [he/she] did not want to be informed of the risks of the [insert medical procedure], then you must conclude that [name of defendant] was not negligent in failing to inform [name of patient] of the risks.**

### DIRECTIONS FOR USE

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the plaintiff indicated that he or she did not want to be informed of the risks of refusing the test.

### SOURCES AND AUTHORITY

- "[A] medical doctor need not make disclosure of risks when the patient requests that he not be so informed." (*Cobbs, supra,* 8 Cal.3d at p. 245.)

- This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9.)

- In *Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1083–1084, the court held that it was not error for the court to refuse an instruction on informed consent where the evidence showed that the doctor's attempt to explain the medical procedure was prevented by the plaintiff's insistence on remaining ignorant of the risks involved.

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 362, p. 449
- California Tort Guide (Cont.Ed.Bar 1996) § 9.11

## 438
## Defenses—Simple Procedure

**[Name of defendant] claims that [he/she] did not have to inform plaintiff of the risks of a [insert medical procedure]. A [insert type of medical practitioner] is not required to tell a patient about the dangers of a simple procedure if it is commonly understood that the dangers are not likely to occur.**

**If [name of defendant] has proved that a [insert medical procedure] is a simple procedure, and that it is commonly understood that any dangers are not likely to occur, then [name of defendant] was not required to inform [name of plaintiff] of the risks.**

### DIRECTIONS FOR USE

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the risks of refusing the test were commonly understood to be unlikely to occur.

### SOURCES AND AUTHORITY

- "[A] disclosure need not be made if the procedure is simple and the danger remote and commonly appreciated to be remote." (*Cobbs, supra, 8* Cal.3d at p. 245.)

- "[T]here is no physician's duty to discuss the relatively minor risks inherent in common procedures, when it is common knowledge that such risks inherent in the procedure are of very low incidence." (*Cobbs, supra,* 8 Cal.3d at p. 244.)

- This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9.)

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1987) § 362, p. 449
- California Tort Guide (Cont.Ed.Bar 1996) § 9.11

## 439
## Defenses—Emotional State of Patient

**[Name of defendant] claims that [he/she] did not have to inform [name of plaintiff] of the risks of the [insert medical procedure]. A [insert type of medical practitioner] does not have to provide information about risks if the information would have so seriously upset the patient that the patient would not be able to reasonably consider the risks of refusing to have the medical procedure.**

**If [name of defendant] has proved that [name of plaintiff] would have been so seriously upset by being told of the risks that [he/she] would not have been able to reasonably consider the risks of refusing to have the [insert medical procedure], then [name of defendant] was not required to inform [name of plaintiff] of the risks.**

### DIRECTIONS FOR USE

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the information regarding the risks of refusing the test would have seriously upset the patient.

### SOURCES AND AUTHORITY

- "A disclosure need not be made beyond that required within the medical community when a doctor can prove by a preponderance of the evidence he relied upon facts which would demonstrate to a reasonable man the disclosure would have so seriously upset the patient that the patient would not have been able to dispassionately weigh the risks of refusing to undergo the recommended treatment." (*Cobbs, supra,* 8 Cal.3d at p. 246.)

- This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9.)

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 362, p. 449
- California Tort Guide (Cont.Ed.Bar 1996) § 9.11

## 440
## Defenses—Emergency

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**[Name of defendant] claims that [he/she] did not have to obtain [name of patient/authorized person]'s informed consent to the [insert medical procedure] because an emergency existed.**

**To succeed on this claim, [name of defendant] must prove both of the following:**

1. **That [name of defendant] reasonably believed the [insert medical procedure] had to be done immediately in order to preserve the life or health of [name of patient]; and**

2. **That it was impossible to obtain [name of patient/authorized person]'s consent to the [insert medical procedure].**

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### DIRECTIONS FOR USE

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the emergency situation made it impossible to inform the patient regarding the risks of refusing the test.

### SOURCES AND AUTHORITY

- Consent is implied in an emergency situation. (*Cobbs, supra,* 8 Cal.3d at p. 243.)

- Business and Professions Code sections 2397(a) and 1627.7(a) provide that a doctor or dentist, respectively, shall not be liable for injury caused in emergency situations by reason of the failure to inform if: (1) the patient was unconscious, (2) there was not enough time, or (3) there was not enough time to get consent from an authorized person.

- This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9.)

- The existence of an emergency situation can also be a defense to battery. (*Wheeler v. Barker* (1949) 92 Cal.App.2d 776, 781; *Preston v. Hubbell* (1948) 87 Cal.App.2d 53, 57; *Hundley v. St. Francis Hospital* (1958) 161 Cal.App.2d 800, 802.)

Secondary Sources

- 5 Witkin, Summary of Cal. Law (9th ed. 1987) Torts, § 368, pp. 455–456
- California Tort Guide (Cont.Ed.Bar 1996) § 9.15

## 450
## Standard of Care

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**A [insert type of professional] is negligent if [he/she] fails to use the skill and care that a reasonably careful [insert type of professionals] would have used in similar circumstances.**

**[In deciding the skill and care that a reasonably careful [insert type of professional] would have used, you must base your decision on the statements of the expert witnesses who have testified in this case.]**

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### DIRECTIONS FOR USE

See Instruction 300, *Issues in the Case (Negligence)* for an instruction on the plaintiff's burden of proof. In legal or other nonmedical professional malpractice cases, the word "legal" or "professional" should be added before the word "negligence" in the first paragraph of instruction 300. (See *Sources and Authority* following Instruction 400, *Issues in the Case, Professional Malpractice (Medical)*.)

The second paragraph should only be used if the court determines that expert testimony is necessary.

If the defendant is a specialist in his or her field, this instruction should be modified to reflect that the defendant is held to the standard of care of a specialist. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810.) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id.* at pp. 810–811.)

Whether an attorney-client relationship exists is a question of law. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733.) If the evidence bearing upon this decision is in conflict, preliminary factual determinations are necessary. (*Ibid.*) Special instructions may need to be crafted for that purpose.

## SOURCES AND AUTHORITY

- The elements of a cause of action in tort for professional negligence are: "(1) The duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200; *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 699.)

- "It is well settled that an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900.)

- Attorneys fall below the standard of care for attorney malpractice if "their advice and actions were so legally deficient when given that it demonstrates a failure to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performing the tasks they undertake." (*Unigard Insurance Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1237; see also *Lucas v. Hamm* (1961) 56 Cal.2d 583, 591–592.)

- Rules of Professional Conduct, Rule 3-110 (Failing to Act Competently) provides:

  (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
  (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
  (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

- Lawyers who hold themselves out as specialists "must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." (*Wright, supra,* 47 Cal.App.3d at p. 810.) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id*. at pp. 810–811.)

- If the failure to exercise due care is so clear that a trier of fact may find professional negligence without expert assistance, then expert testimony is not required: " 'In other words, if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary.' " (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1093 [internal citations omitted].)

Secondary Sources

- 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, §§ 315–318
- 6 Witkin, Summary of Cal. Law (9th ed. 1987) §§ 804–805

## 451
## Damages for Negligent Handling of Legal Matter

**To recover damages from [name of defendant], [name of plaintiff] must prove that [he/she/it] would have obtained a better result if [name of defendant] had acted as a reasonably careful attorney.**

### DIRECTIONS FOR USE

In *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, the trial-within-a-trial method was applied to accountants. In cases involving professionals other than attorneys, this instruction would need to be modified by inserting the type of the professional in place of "attorney."

The issue of collectibility does not apply to every legal malpractice action: "It is only where the alleged malpractice consists of mishandling a client's claim that the plaintiff must show proper prosecution of the matter would have resulted in a favorable judgment and collection thereof." (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1506.)

### SOURCES AND AUTHORITY

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. [Citations.] The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm not yet realized does not suffice to create a cause of action for negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 749–750.)

- The trial within-a-trial method "is the most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit damages to those actually caused by a professional's malfeasance." (*Mattco Forge, supra,* 52 Cal.App.4th at p. 834.)

- To prove damages in a legal malpractice action, plaintiff must show the probable value of the lawsuit that he or she has lost. Plaintiff must also prove that careful management of his or her claim would have resulted in a favorable judgment and collection of it. (*Campbell v. Magana* (1960) 184 Cal.App.2d 751, 754.) There is no

damage in the absence of these latter elements. (*DiPalma, supra*, 27 Cal.App.4th at pp. 1506–1507.)

- "Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine." (*Arciniega v. Bank of San Bernardino* (1997) 52 Cal.App.4th 213, 231.)

- The measure of damages in a case predicated on legal malpractice "is the difference between what was recovered and what would have been recovered but for the attorney's wrongful act or omission. … [I]f a reasonably competent attorney would have obtained a $3 million recovery for the client but the negligent attorney obtained only a $2 million recovery, the client's damage due to the attorney's negligence would be $1 million—the difference between what a competent attorney would have obtained and what the negligent attorney obtained." (*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1758.)

- "The trial-within-a-trial method does not 'recreate what a particular judge or fact finder would have done. Rather, the jury's task is to determine what a reasonable judge or fact finder would have done.' " (*Mattco Forge, supra*, 52 Cal.App.4th at p. 840.)

Secondary Sources

- 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 338, pp. 413–415

## 452
## Error in Legal Judgment

**An attorney is not necessarily negligent just because he or she makes a mistake. A mistake is negligence only if the attorney was not as careful and skillful as other attorneys would have been in similar circumstances.**

### SOURCES AND AUTHORITY

- "The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers." (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591 [internal citations omitted].)

- Jury instructions stating this principle are proper: "[A]n attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." (*Smith v. Lewis* (1975) 13 Cal.3d 349, 358, overruled in part on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851.)

Secondary Sources

- 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, §§ 342–345

## 453
## Alternative Legal Decisions or Strategies

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**An attorney is not necessarily negligent just because he or she [chooses one legal strategy/makes a decision/makes a recommendation] and it turns out that another [strategy/decision/recommendation] would have been the better choice.**

**An attorney is negligent only if a reasonably careful attorney would not have made that same choice under similar circumstances.**

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### SOURCES AND AUTHORITY

- "We recognize, of course, that an attorney engaging in litigation may have occasion to choose among various alternative strategies available to his client … . " (*Smith v. Lewis* (1975) 13 Cal.3d 349, 359, overruled in part on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851.)

- " 'In view of the complexity of the law and the circumstances which call for difficult choices among possible courses of action, the attorney cannot be held legally responsible for an honest and reasonable mistake of law or an unfortunate selection of remedy or other procedural step.' [Citation.]" (*Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, 613.)

## 454
## Referral to Legal Specialist

**If a reasonably careful attorney in a similar situation would have consulted with or referred [name of plaintiff] to a legal specialist, then [name of defendant] is negligent if:**

1. **[He/She] did not consult or refer; and**

2. **[He/She] failed to handle the case with the skill and care of a legal specialist.**

### SOURCES AND AUTHORITY

- This type of an instruction was approved for use in legal malpractice cases in *Horne v. Peckham* (1979) 97 Cal.App.3d 404, 414–415, disapproved on other grounds in *ITT Small Business Finance Corp. v. Niles* (1994) 9 Cal.4th 245, 256.

- Rule of Professional Conduct: Rule 3-110 (C) (Failing to Act Competently) provides: "If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required."

Secondary Sources

- 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 319, pp. 387–388

## 455
## Breach of Fiduciary Duty

**An attorney has a fiduciary duty to the client. A fiduciary duty is the duty of good faith and undivided loyalty.**

**[Name of plaintiff] claims that [he/she/it] was harmed because [name of defendant] breached [his/her] fiduciary duty of [insert duty, e.g., confidentiality]. To succeed on this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of defendant] broke the fiduciary duty of [insert duty];**

2. **That [name of plaintiff] was harmed; and**

3. **That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.**

### DIRECTIONS FOR USE

The existence of a fiduciary relationship is a question of law. Whether an attorney has breached that fiduciary duty is a question of fact. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890.)

### SOURCES AND AUTHORITY

- "The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach. [Citation.]" (*Mosier v. Southern California Physicians Insurance Exchange* (1998) 63 Cal.App.4th 1022, 1044.)

- "The relation between attorney and client is a fiduciary relation of the very highest character." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189.)

- Breach of fiduciary duty is a concept that is separate and distinct from traditional professional negligence but which still comprises legal malpractice. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.)

- "Expert testimony is not required, but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge." (*Stanley, supra,* 35 Cal.App.4th at p. 1087 [internal citations omitted].)

- "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' " (*Stanley, supra,* 35 Cal.App.4th at p. 1087, quoting *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 45; *David Welch Co., supra,* 203 Cal.App.3d at p. 890.)

Secondary Sources

- 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 118, pp. 155–157

## 800
## Issues in the Case

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**[Name of plaintiff] claims that [he/she/it] and [name of defendant] entered into a contract for [insert brief summary of alleged contract].**

**[Name of plaintiff] claims that [name of defendant] breached, or broke, this contract by [briefly state the alleged breach].**

**[Name of plaintiff] also claims that [name of defendant]'s breach of this contract caused harm to [name of plaintiff] for which [name of defendant] should pay.**

**[Name of defendant] denies [insert denial of any of the above claims]. [Name of defendant] also claims [insert affirmative defense].**

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### DIRECTIONS FOR USE

This instruction is designed to introduce the jury to the issues involved in the case. It should be read before the instructions on the substantive law.

### SOURCES AND AUTHORITY

- The Supreme Court has observed that "[c]ontract and tort are different branches of law. Contract law exists to enforce legally binding agreements between parties; tort law is designed to vindicate social policy." (*Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.* (1994) 7 Cal.4th 503, 514.)

- "The differences between contract and tort give rise to distinctions in assessing damages and in evaluating underlying motives for particular courses of conduct. Contract damages seek to approximate the agreed-upon performance … and are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectations of the parties are not recoverable." (*Applied Equipment Corp, supra,* 7 Cal.4th. at p. 515 (internal citations omitted).)

- Certain defenses are decided as questions of law, not as questions of fact. These defenses include frustration of purpose, impossibility, and impracticability. (*Oosten v. Hay Haulers Dairy Employees and Helpers Union* (1955) 45 Cal.2d 784, 788; *Mitchell v. Ceasan Tires* (1944) 25 Cal.2d 45, 48; *Autry v. Republic Productions, Inc.* (1947) 30 Cal.2d 144, 157; *Glen Falls Indemnity Co. v. Perscallo* (1950) 96 Cal.App.2d 799, 802.)

- "Defendant contends that frustration is a question of fact resolved in its favor by the trial court. The excuse of frustration, however, *like that of impossibility*, is a conclusion of law drawn by the court from the facts of a given case … ." (*Mitchell, supra*, 25 Cal.2d at p. 48, italics added.)

- Estoppel is a "nonjury fact question to be determined by the trial court in accordance with applicable law." (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe and Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 772–790, 813–815

# 801
# Third-Party Beneficiary

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**[Name of plaintiff] is not a party to the contract. However, [name of plaintiff] may be entitled to damages for breach of contract if [he/she/it] proves that [insert names of the contracting parties] intended for [name of plaintiff] to benefit from their contract.**

**It is not necessary for [name of plaintiff] to have been named in the contract. In deciding what [insert names of the contracting parties] intended, you should consider the entire contract and the circumstances under which it was made.**

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## DIRECTIONS FOR USE

This topic may or may not be a question for the jury to decide. Third-party beneficiary status may be determined as a question of law if there is no conflicting extrinsic evidence. (*Kalmanovitz v. Bitting* (1996) 43 Cal.App.4th 311, 315.)

These pattern jury instructions may need to be modified in cases brought by plaintiffs who are third-party beneficiaries.

## SOURCES AND AUTHORITY

- Civil Code section 1559 provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

- A third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that individual and such intent appears from the terms of the agreement. (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 558.) However, “[i]nsofar as intent to benefit a third person is important in determining his right to bring an action under a contract, it is sufficient that the promisor must have understood that the promisee had such intent. No specific manifestation by the promisor of an intent to benefit the third person is required.” (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591.)

- "Traditional third party beneficiary principles do not require that the person to be benefited be named in the contract." (*Harper v. Wasau Insurance Co.* (1997) 56 Cal.App.4th 1079, 1086.)

- Civil Code section 1559 excludes enforcement of a contract by persons who are only incidentally or remotely benefited by the agreement. (*Lucas, supra,* 56 Cal.2d at p. 590.)

- "Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered. [Citation.]" (*Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1725.)

- Restatement Second of Contracts section 302 provides:

  (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
    (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
    (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
  (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

  This section has been cited by California courts. (See, e.g., *Outdoor Services v. Pabagold* (1986) 185 Cal.App.3d 676, 684.)

- The burden is on the third party "to prove that the performance [it] seeks was actually promised." (*Garcia v. Truck Insurance Exchange* (1984) 36 Cal.3d 426, 436; *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348–349.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 653–673

## 802
## Contract Formation—Issues in the Case

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**[Name of plaintiff] claims that the parties entered into a contract. To prove that a contract was created, [name of plaintiff] must prove all of the following:**

**[That the parties were legally capable of entering into the contract;]**

**[That the contract terms were clear enough that the parties could understand what each was required to do;]**

**[That the contract had a legal purpose;]**

**[That the parties agreed to give each other something of value. (A promise to do something or not to do something may have value.); ] [and]**

**[That the parties agreed to the terms of the contract. When you examine whether the parties agreed to the terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement. You may not consider the parties' hidden intentions.]**

**If [name of plaintiff] did not prove all of the above, then a contract was not created.**

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### DIRECTIONS FOR USE

This instruction should only be given where the existence of a contract is contested. If both parties agree that they had a contract, then the instructions relating to whether or not a contract was actually formed would not need to be given. At other times, the parties may be contesting only a limited number of contract formation issues. Also, some issues may be decided by the judge as a matter of law. In those cases, the judge may wish to delete the bracketed elements that are not contested so that the jury can focus on the contested issues.

The terms "legally capable" and "legal purpose" may require further definition if these issues are before the jury. However, the judge would most likely decide these two issues and so these issues could be deleted from the instruction before it is given to the jury.

The final bracketed element of this instruction would be given prior to instructions on offer and acceptance. If neither offer nor acceptance is contested, then this element of the instruction would not need to be given to the jury.

## SOURCES AND AUTHORITY

- Civil Code section 1550 provides:

  It is essential to the existence of a contract that there should be:
  1. Parties capable of contracting;
  2. Their consent;
  3. A lawful object; and
  4. A sufficient cause or consideration.

*Capacity*

- Civil Code section 1556 provides: "All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights."

*Lawful Object*

- The issue of whether a contract is illegal or contrary to public policy is a question of law. (*Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 350.)

*Certainty*

- "In order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.' [Citation.]" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.)

- Section 33(1) of the Restatement Second of Contracts provides: "Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain." Section 33(2) provides: "The terms of a contract are reasonably certain if

they provide a basis for determining the existence of a breach and for giving an appropriate remedy."

- Courts have stated that the issue of whether a contract is sufficiently definite is a question of law for the court. (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 814, fn. 2; *Ersa Grea Corp. v. Flour Corp.* (1991) 1 Cal.App.4th 613, 623.)

*Consideration*

- Civil Code section 1605 defines "good consideration" as follows: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor is a good consideration for a promise."

- Civil Code section 1614 provides: "A written instrument is presumptive evidence of consideration." Civil Code section 1615 provides: "The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it."

- In *Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 884, the court concluded that the presumption of consideration in section 1614 goes to the burden of producing evidence, not the burden of proof.

- Lack of consideration is an affirmative defense and must be alleged in answer to the complaint. (*National Farm Workers Service Center, Inc. v. M. Caratan, Inc.* (1983) 146 Cal.App.3d 796, 808).

- "Consideration consists not only of benefit received by the promisor, but of detriment to the promisee. … 'It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.' " (*Flojo Internat., Inc. v. Lassleben* (1992) 4 Cal.App.4th 713, 719 (internal citation omitted).)

- "Consideration may be an act, forbearance, change in legal relations, or a promise." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 207.)

*Mutual Consent*

- Mutual consent is an essential contract element. (Civ. Code, § 1550.) Under Civil Code section 1565, "[t]he consent of the parties to a contract must be: 1. Free; 2. Mutual; and 3. Communicated by each to the other." Civil Code section 1580 provides, in part: "Consent is not mutual, unless the parties all agree upon the same thing in the same sense."

- California courts use the objective standard to determine mutual consent: "[A plaintiff's] uncommunicated subjective intent is not relevant. The existence of mutual assent is determined by objective criteria. The test is whether a reasonable person would, from the conduct of the parties, conclude that there was mutual agreement." (*Hilleary v. Garvin* (1987) 193 Cal.App.3d 322, 327 (internal citations omitted); see also *Roth v. Malson* (1999) 67 Cal.App.4th 552, 557.)

- Actions as well as words are relevant: "The manifestation of assent to a contractual provision may be wholly or partly by written or spoken words or by other acts or by failure to act." (*Merced County Sheriff's Employees Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 670 (quoting Rest. 2d Contracts, § 19).)

- The surrounding circumstances can also be relevant in determining whether a binding contract has been formed. (*California Food Service Corp. v. Great American Insurance Co.* (1982) 130 Cal.App.3d 892, 897.) "If words are spoken under circumstances where it is obvious that neither party would be entitled to believe that the other intended a contract to result, there is no contract." (*Fowler v. Security-First National Bank* (1956) 146 Cal.App.2d 37, 47.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 119, 145, 207, 332, 357, 364, 429, 430

## 803
## Breach of Contract—Issues in the Case

**In order to prove a breach of contract, [name of plaintiff] must prove each of the following:**

**[That [name of plaintiff] and [name of defendant] entered into a contract;]**

**[That [name of plaintiff] did all, or substantially all of the things that the contract required [name of plaintiff] to do [or that [name of plaintiff] was excused from having to do those things] ;]**

**[That all conditions required for [name of defendant]'s performance had occurred;]**

**[That [name of defendant] failed to do something that the contract required [name of defendant] to do;] [and]**

**[That [name of plaintiff] was harmed by that failure.]**

**If you find that [name of plaintiff] proved each of the above, your verdict on this claim should be for [name of plaintiff]. If you do not find that all of the above have been proved, your verdict should be for [name of defendant].**

### DIRECTIONS FOR USE

In many cases, some of the above elements may not be contested. In those cases, the judge may wish to delete the bracketed elements that are not contested so that the jury can focus on the contested issues.

Equitable remedies are also available for breach. "As a general proposition, '[t]he jury trial is a matter of right in a civil action at law, but not in equity. [Citations.]' " (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8; *Selby Contractors, Inc. v. McCarthy* (1979) 91 Cal.App.3d 517, 524.) However, juries may render advisory verdicts on these issues. (*Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 670–671.)

## SOURCES AND AUTHORITY

- A complaint for breach of contract must include the following: (1) the existence of a contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) damages to plaintiff therefrom. (*Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913.) Additionally, if the defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove that the event transpired. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380.)

- Civil Code section 1549 provides: "A contract is an agreement to do or not to do a certain thing." Courts have defined the term as follows: "A contract is a voluntary and lawful agreement, by competent parties, for good consideration, to do or not to do a specified thing." (*Robinson v. Magee* (1858) 9 Cal. 81, 83.)

- Section 1 of the Restatement Second of Contracts provides: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."

- "The wrongful, i.e., the unjustified or unexcused, failure to perform a contract is a breach. Where the nonperformance is legally justified, or excused, there may be a failure of consideration, but not a breach." (1 Witkin, Summary of California Law (9th ed. 1987) § 791, p. 715 (internal citations omitted).) "Ordinarily, a breach is the result of an intentional act, but negligent performance may also constitute a breach, giving rise to alternative contract and tort actions." (*Ibid*.)

- The doctrine of substantial performance does not apply to the party accused of the breach. Section 235(2) of the Restatement Second of Contracts provides: "When performance of a duty under a contract is due any non-performance is a breach." Comment (b) to section 235 states that "[w]hen performance is due, … anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial."

<u>Secondary Sources</u>

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 791, p. 715

## 804
## Oral or Written Contract Terms

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**[Contracts may be written or oral.]**

**[Contracts may be partly written and partly oral.]**

**Oral contracts are just as valid as written contracts.**

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### DIRECTIONS FOR USE

Depending on the facts, only one of the bracketed alternative instructions would probably need to be given.

If the agreement is fully integrated, this instruction should not be given. Parol evidence is inadmissible if the judge finds that the written agreement is fully integrated: "The parol evidence rule generally prohibits the introduction of extrinsic evidence — oral or written — to vary or contradict the terms of an integrated written instrument." (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 175.)

### SOURCES AND AUTHORITY

- Civil Code section 1622 provides that "all contracts may be oral, except such as are specially required by statute to be in writing." (See also Civ. Code, § 1624.)

- In *Lande v. Southern California Freight Lines* (1948) 85 Cal.App.2d 415, 420, the court answered the question "May a contract be partly written and partly oral?" as follows: "This question posed by defendant must be answered in the affirmative in this sense: that a contract or agreement in legal contemplation is neither written nor oral, but oral or written evidence may be received to establish the terms of the contract or agreement between the parties. … A so-called partly written and partly oral contract is in legal effect a contract, the terms of which may be proven by both written and oral evidence."

- Evidence of a contract that is partly oral may be admitted if only part of the contract is fully integrated: "When the parties to a written contract have agreed to it as an 'integration' - a complete and final embodiment of the terms of an agreement - parol evidence cannot be used to add to or vary its terms. . . . . [However,] '[w]hen only part of the agreement is integrated, the same rule applies to that part, but parol evidence may be used to prove elements of the agreement not reduced to writing.' " (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225.)

## 805
## Implied-in-Fact Contract

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**In deciding whether a contract was created, you should consider the conduct and relationship of the parties as well as all the circumstances of the case.**

**Contracts can be created by the conduct of the parties, without spoken or written words. Contracts created by conduct are just as valid as contracts formed with words.**

**Conduct will create a contract if the conduct of both parties is intentional and each knows, or has reason to know, that the other party will interpret the conduct as an agreement to enter into a contract.**

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### SOURCES AND AUTHORITY

- Civil Code sections 1619–1621 together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."

- Section 19(2) of the Restatement Second of Contracts provides: "The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."

- "Unlike the 'quasi-contractual' quantum meruit theory which operates without an actual agreement of the parties, an implied-in-fact contract entails an actual contract, but one manifested in conduct rather than expressed in words." (*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 455.)

- Express and implied-in-fact contracts have the same legal effect, but differ in how they are proven at trial: " 'Contracts may be express or implied. These terms, however, do not denote different kinds of contracts, but have reference to the evidence by which the agreement between the parties is shown. If the agreement is shown by the direct words of the parties, spoken or written, the contract is said to be an express one. But if such agreement can only be shown by the acts and conduct of the parties, interpreted in the light of the subject-matter and of the surrounding circumstances, then the contract is an implied one.' " (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 678 fn. 16 (internal citation omitted).)

- "As to the basic elements [of a contract cause of action], there is no difference between an express and implied contract. … While an implied in fact contract may be inferred from the conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is an intent to promise." (*Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1977) 69 Cal.App.3d 268, 275; see also *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 888.)

- The formation of an implied contract can become an issue for the jury to decide: "Whether or not an implied contract has been created is determined by the acts and conduct of the parties and all the surrounding circumstances involved and is a question of fact." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 611 (internal citation omitted).)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 11, pp. 46–47

## 806
## Unformalized Agreement

**[Name of defendant] claims that the parties did not enter into a contract because the agreement was never written and signed. To overcome this claim, [name of plaintiff] must prove both of the following:**

1. **That the parties understood and agreed to the terms of the agreement; and**

2. **That the parties agreed to be bound without a written agreement [or before a written agreement was prepared].**

### SOURCES AND AUTHORITY

- "Where the writing at issue shows 'no more than an intent to further reduce the informal writing to a more formal one' the failure to follow it with a more formal writing does not negate the existence of the prior contract. However, where the writing shows it was not intended to be binding until a formal written contract is executed, there is no contract." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307 (internal citations omitted).)

- The execution of a formalized written agreement is not necessarily essential to the formation of a contract that is made orally: "[I]f the respective parties orally agreed upon all of the terms and conditions of a proposed written agreement with the mutual intention that the oral agreement should thereupon become binding, the mere fact that a formal written agreement to the same effect has not yet been signed does not alter the binding validity of the oral agreement. [Citation.]" (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358.)

- If the parties have agreed not to be bound until the agreement is reduced to writing and signed by the parties, then the contract will not be effective until the formal agreement is signed. (*Beck v. American Health Group International, Inc.* (1989) 211 Cal.App.3d 1555, 1562.)

- "Whether it was the parties' mutual intention that their oral agreement to the terms contained in a proposed written agreement should be binding immediately is to be determined from the surrounding facts and circumstances of a particular case and is a question of fact for the trial court." (*Banner Entertainment, Inc., supra,* 62 Cal.App.4th at p. 358.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 136, 142

## 807
## Contract Formation—Offer

**Both an offer and an acceptance are required to create a contract. [Name of defendant] claims that a contract was not created because [name of plaintiff] did not make an offer. To overcome this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of plaintiff] communicated to [name of defendant] that [he/she/it] was willing to enter into a contract with [name of defendant];**

2. **That the communication contained specific terms; and**

3. **That, based on the communication, [name of defendant] could have reasonably concluded that a contract with these terms would result if [he/she/it] accepted the offer.**

**If [name of plaintiff] did not prove all of the above, then a contract was not created.**

### DIRECTIONS FOR USE

This instruction assumes that the defendant is claiming the plaintiff never made an offer. Change the identities of the parties in the brackets if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror.) If the existence of an offer is not contested, then this instruction is unnecessary.

### SOURCES AND AUTHORITY

- Courts have adopted the definition of "offer" found at Restatement Second of Contracts, section 24: " An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." (*City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 930.)

- Under basic contract law "[a]n offer must be sufficiently definite, or must call for such definite terms in the acceptance that the performance promised is reasonably certain." (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770.)

- "The trier of fact must determine 'whether a reasonable person would necessarily assume ... a willingness to enter into contract.' [Citation.]" (*In re First Capital Life Insurance Co.* (1995) 34 Cal.App.4th 1283, 1287.)

- Offers should be contrasted with preliminary negotiations: "Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid subsisting agreement." (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 59.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 128, 145

## 808
## Contract Formation—Revocation of Offer

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**Both an offer and an acceptance are required to create a contract. [Name of defendant] claims that [he/she/it] withdrew [his/her/its] offer before [name of plaintiff] accepted it. To overcome this claim, [name of plaintiff] must prove one of the following:**

**1. That [name of defendant] did not withdraw the offer; or**

**2. That [name of plaintiff] accepted the offer before [name of defendant] withdrew it; or**

**3. That [name of defendant]'s withdrawal of the offer was never communicated to [name of plaintiff].**

**If [name of plaintiff] did not prove any of the above, then a contract was not created.**

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### DIRECTIONS FOR USE

This instruction assumes that the defendant is claiming to have revoked his or her offer. Change the identities of the parties in the brackets if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeree).

### SOURCES AND AUTHORITY

- Civil Code section 1586 provides: "A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards."

- The methods for revocation are listed in Civil Code section 1587, and include:
  1) Communication of revocation,
  2) Lapse of time for acceptance,
  3) Failure to fulfill condition precedent to acceptance, and
  4) By death or insanity of proposer.

This instruction addresses the first method.

- "It is a well-established principle of contract law that an offer may be revoked by the offeror any time prior to acceptance." (*T. M. Cobb Co., Inc. v. Superior Court* (1984) 36 Cal.3d 273, 278.)

- " 'Under familiar contract law, a revocation of an offer must be directed to the offeree.' [Citation.]" (*Moffett v. Barclay* (1995) 32 Cal.App.4th 980, 983.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 166–171

## 809
## Contract Formation—Acceptance

**Both an offer and an acceptance are required to create a contract. [Name of defendant] claims that a contract was not created because [he/she/it] did not accept [name of plaintiff]'s offer. To overcome this claim, [name of plaintiff] must prove both of the following:**

1. **That [name of defendant] agreed to be bound by the terms of the offer, and**

2. **That [name of defendant] communicated [his/her/its] agreement to [name of plaintiff].**

**[However, if [name of defendant] agreed to be bound only on certain conditions, or if [name of defendant] introduced a new term into the bargain, then there was no acceptance.]**

**If [name of plaintiff] did not prove both of the above, then a contract was not created.**

### DIRECTIONS FOR USE

This instruction assumes that the defendant is claiming to have not accepted plaintiff's offer. Change the identities of the parties in the brackets if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

### SOURCES AND AUTHORITY

- Civil Code 1585 provides: "An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal."

- "[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract; and a qualified acceptance

amounts to a new proposal or counteroffer putting an end to the original offer." (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855–856.)

- "[I]t is not necessarily true that any communication other than an unequivocal acceptance is a rejection. Thus, an acceptance is not invalidated by the fact that it is 'grumbling,' or that the offeree makes some simultaneous 'request.' Nevertheless, it must appear that the 'grumble' does not go so far as to make it doubtful that the expression is really one of assent. Similarly, the 'request' must not add additional or different terms from those offered. Otherwise, the 'acceptance' becomes a counteroffer." (*Guzman v.Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1376.)

- "The interpretation of the purported acceptance or rejection of an offer is a question of fact. Further, based on the general rule that manifested mutual assent rather than actual mental assent is the essential element in the formation of contracts, the test of the true meaning of an acceptance or rejection is not what the party making it thought it meant or intended it to mean. Rather, the test is what a reasonable person in the position of the parties would have thought it meant." (*Guzman, supra*, 71 Cal.App.4th at pp. 1376–1377.)

- "Acceptance of an offer, which may be manifested by conduct as well as by words, must be expressed or communicated by the offeree to the offeror." (*Russell v. Union Oil Co.* (1970) 7 Cal.App.3d 110, 114.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 186–197

## 810
## Contract Formation—Acceptance by Silence

**Ordinarily, if a party does not say or do anything in response to another party's offer, then he or she has not accepted the offer. However, if [name of plaintiff] proves that both [name of plaintiff] and [name of defendant] understood silence or inaction to mean that [name of defendant] had accepted [name of plaintiff]'s offer, then there was an acceptance.**

### DIRECTIONS FOR USE

This instruction assumes that the defendant is claiming to have not accepted plaintiff's offer. Change the identities of the parties in the brackets if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

This instruction should be read in conjunction with and immediately after instruction 809, *Contract Formation—Acceptance*, if acceptance by silence is an issue.

### SOURCES AND AUTHORITY

- Because acceptance must be communicated, "[s]ilence in the face of an offer is not an acceptance, unless there is a relationship between the parties or a previous course of dealing pursuant to which silence would be understood as acceptance." (*Southern California Acoustics Co., Inc. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 722.)

- Acceptance may also be inferred from inaction where one has a duty to act, and from retention of the offered benefit. (*Golden Eagle Insurance Co. v. Foremost Insurance Co.* (1993) 20 Cal.App.4th 1372, 1386.)

- Civil Code section 1589 provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

- Section 69(1) of the Restatement Second of Contracts provides:

  (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
  (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
  (b) Where the offeror has stated or given the offeree reason to understand the assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
  (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 198–202

## 811
## Contract Formation—Rejection of Offer

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**[Name of defendant] claims that [his/her/its] offer to enter into a contract terminated because [name of plaintiff] rejected the offer. To overcome this claim, [name of plaintiff] must prove one the following:**

1. **That [name of plaintiff] did not communicate a rejection of the offer to [name of defendant]; or**

2. **That [name of plaintiff] did not communicate any additions or changes to the terms of the offer to [name of defendant].**

**If [name of plaintiff] did not prove one of the above, then a contract was not created.**

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### DIRECTIONS FOR USE

This instruction assumes that the defendant is claiming plaintiff rejected defendant's offer. Change the identities of the parties in the brackets if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeree).

Conceptually, this instruction dovetails with instruction 809, *Contract Formation—Acceptance*. This instruction is designed for the situation where a party who has rejected an offer by not accepting it on its terms.

### SOURCES AND AUTHORITY

- Civil Code 1585 provides: "An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal."

- Section 39(2) of the Restatement Second of Contracts provides that "[a]n offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror

has manifested a contrary intention or unless the counteroffer manifests a contrary intention of the offeree."

- Cases provide that "a qualified acceptance amounts to a new proposal or counter-offer putting an end to the original offer. … A counter-offer containing a condition different from that in the original offer is a new proposal and, if not accepted by the original offeror, amounts to nothing." (*Apablasa v. Merrit and Co.* (1959) 176 Cal.App.2d 719, 726 (internal citations omitted).) More succinctly: "The rejection of an offer kills the offer." (*Stanley v. Robert S. Odell and Co.*, 97 Cal.App.2d 521, 534.)

- "[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer." (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855–856.)

- The original offer terminates as soon as the rejection is communicated to the offeror: "It is hornbook law that an unequivocal rejection by an offeree, communicated to the offeror, terminates the offer; even if the offeror does no further act, the offeree cannot later purport to accept the offer and thereby create enforceable contractual rights against the offeror." (*Beverly Way Associates v. Barham* (1990) 226 Cal.App.3d 49, 55.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 172, p. 187

## 812
## Substantial Performance

**[Name of defendant] claims that [name of plaintiff] did not perform all of the things that [name of plaintiff] was required to do under the contract, and therefore [name of defendant] did not have to perform [his/her/its] obligations under the contract. To overcome this claim, [name of plaintiff] must prove the following:**

1. **That [name of plaintiff] made a goodfaith effort to comply with the contract; and**

2. **That [name of defendant] received essentially what the contract called for because [name of plaintiff]'s failures, if any, were so trivial or unimportant that they could have been easily fixed or paid for.**

### SOURCES AND AUTHORITY

- " 'Substantial performance means that there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, and that the contractor has in good faith performed all of its substantive terms. If so, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed.' " (*Connell v. Higgins* (1915) 170 Cal. 541, 556 (internal citation omitted).)

- The Supreme Court has cited the following passage from Witkin with approval: "At common law, recovery under a contract for work done was dependent upon a complete performance, although hardship might be avoided by permitting recovery in quantum meruit. The prevailing doctrine today, which finds its application chiefly in building contracts, is that substantial performance is sufficient, and justifies an action on the contract, although the other party is entitled to a reduction in the amount called for by the contract, to compensate for the defects. What constitutes substantial performance is a question of fact, but it is essential that there be no wilful departure from the terms of the contract, and that the defects be such as may be easily remedied or compensated, so that the promisee may get practically what the contract calls for."

(*Posner v. Grunewald-Marx, Inc*. (1961) 56 Cal.2d 169, 186–187; see also *Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal.App.3d 88, 101.)

- " 'Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact.' " (*Connell, supra,* 170 Cal. at pp. 556–557 (internal citation omitted).)

- "The doctrine of substantial performance has been recognized in California since at least 1921, when the California Supreme Court decided the landmark case of *Thomas Haverty Co. v. Jones* [citation], in which it was stated: 'The general rule on the subject of (contractual) performance is that "Where a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing he agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, or by operation of law, or by the act of God or the public enemy." ' " (*Tolstoy Construction Co. v. Minter* (1978) 78 Cal.App.3d 665, 671.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 762–766

## 813
## Modification

**[Name of party] claims that the original contract was modified, or changed. [Name of party] must prove that the parties agreed to the modification. [Name of other party] denies that the contract was modified.**

**The parties to a contract may agree to modify its terms. You must decide whether a reasonable person would conclude from the words and conduct of [name of plaintiff] and [name of defendant] that they agreed to modify the contract. You cannot consider the parties' hidden intentions.**

### SOURCES AND AUTHORITY

- "It is axiomatic that the parties to an agreement may modify it." (*Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 519.)

- Civil Code section 1698 provides:

  (a) A contract in writing may be modified by a contract in writing.
  (b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.
  (c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions.
  (d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.

- Civil Code section 1697 provides: "A contract not in writing may be modified in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the modification."

- "Modification is a change in the obligation by a modifying agreement which requires mutual assent." (*Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457.)

- "A contract can, of course, be subsequently modified with the assent of the parties thereto, provided the same elements essential to the validity of the original contract are present." (*Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 223 (internal citations omitted).)

- Consideration is unnecessary if the modification is to correct errors and omissions. (*Texas Co. v. Todd* (1937) 19 Cal.App.2d 174, 185.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 909–916

## 814
## Interpretation—Disputed Term

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**[Name of plaintiff] and [name of defendant] dispute the meaning of the following term contained in their contract: [insert text of term].**

**[Name of plaintiff] claims that the term means: [insert plaintiff's interpretation of the term]. [Name of defendant] claims that the term means: [insert defendant]'s interpretation of the term]. [Name of plaintiff] must prove that [his/her/its] interpretation of the term is correct.**

**In deciding what the terms of a contract mean, you must decide what the parties intended at the time the contract was created. You may consider the usual and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract.**

**[The following instructions may also help you interpret the terms of the contract: ]**

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### DIRECTIONS FOR USE

Read any of the following instructions (as appropriate) on tools for interpretation (instructions 815 through 820) after reading the last bracketed sentence.

### SOURCES AND AUTHORITY

- Section 200 of the Restatement Second of Contracts provides: "Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning."

- Civil Code section 1636 provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

- Civil Code section 1647 provides: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

- Ordinarily, interpretation is a question of law. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865–866; Evid. Code, § 310(a).) However, where the contract must be interpreted by conflicting extrinsic evidence, and where the interpretation depends on the resolution of such evidence, then it becomes a question for the jury: "When parol evidence is introduced in aid of the interpretation of uncertain or doubtful language in the contract, the question of the meaning or intent of the parties is one of fact. If the meaning or intent is to be determined one way according to one view of the facts and another way according to another view, the determination of the disputed matter must be left to the jury." (*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1560.)

- California courts apply an objective test to determine the intent of the parties: "In interpreting a contract, the objective intent, as evidenced by the words of the contract is controlling. We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made. [Citation.]" (*Lloyd's Underwriters v. Craig & Rush* (1994) 26 Cal.App.4th 1194, 1197–1198.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 681, pp. 615–616

## 815
## Interpretation—Meaning of Ordinary Words

**You should assume that the parties intended the words in their contract to have their usual and ordinary meaning unless you decide that the parties intended the words to have a special meaning.**

### SOURCES AND AUTHORITY

- Civil Code section 1644 provides: "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

- "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. Such intent is to be inferred, if possible, solely from the written provisions of the contract. The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage,' controls judicial interpretation. Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 (internal citations omitted).)

- "Generally speaking, words in a contract are to be construed according to their plain, ordinary, popular or legal meaning, as the case may be. However, particular expressions may, by trade usage, acquire a different meaning in reference to the subject matter of a contract. If both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage and parol evidence is admissible to establish the trade usage even though the words in their ordinary or legal meaning are entirely unambiguous. [Citation.]" (*Hayter Trucking Inc. v. Shell Western E & P, Inc.* (1993) 18 Cal.App.4th 1, 15.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 685, pp. 618–619

## 816
## Interpretation—Meaning of Technical Words

**You should assume that the parties intended technical words used in the contract to have the meaning that is usually given to them by people who work in that technical field, unless you decide that the parties clearly used the words in a different sense.**

### SOURCES AND AUTHORITY

- Civil Code section 1645 provides: "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."

- A court will look beyond the terms of the writing where it appears that the parties intended to ascribe a technical meaning to the terms used. (*Cooper Companies, Inc. v. Transcontinental Insurance Co.* (1995) 31 Cal.App.4th 1094, 1101.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 685, pp. 618–619

## 817
## Interpretation—Construction of Contract as a Whole

**In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.**

### SOURCES AND AUTHORITY

- Civil Code section 1641 provides: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

- "[T]he contract must be construed as a whole and the intention of the parties must be ascertained from the consideration of the entire contract, not some isolated portion." (*County of Marin v. Assessment Appeals Bd. of Marin County* (1976) 64 Cal.App.3d 319, 324–325.)

- Contracts should be construed as a whole, with each clause lending meaning to the others. Contractual language should be interpreted in a manner that gives force and effect to every clause rather than to one that renders clauses nugatory, inoperative, or meaningless. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473; *Titan Corp. v. Aetna Casualty and Surety Co.* (1994) 22 Cal.App.4th 457, 473–474.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 686, pp. 619–620

## 818
## Interpretation—Construction by Conduct

**In deciding what the words in a contract meant to the parties, you may consider how the parties acted after the contract was created but before any disagreement between the parties arose.**

### SOURCES AND AUTHORITY

- "In construing contract terms, the construction given the contract by the acts and conduct of the parties with knowledge of its terms, and before any controversy arises as to its meaning, is relevant on the issue of the parties' intent." (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1242 (citing *Southern California Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851.)

- This instruction covers the "rule of practical construction." This rule "is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent." (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754.)

- "The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions." (*Kennecott Corp. v. Union Oil Co. of California* (1987) 196 Cal.App.3d 1179, 1189.)

- "When the parties perform without objection under a contract the terms of which appear to be indefinite, they have indicated that its terms were sufficiently certain so that they, at least, could perform it." (*Crestview Cemetery Assn., supra,* 54 Cal.2d at p. 795.)

- "[T]his rule is not limited to the joint conduct of the parties in the course of performance of the contract. As stated in Corbin on Contracts, 'The practical interpretation of the contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party, even though that other party had no

knowledge of those words or acts when they occurred and did not concur in them. In the litigation that has ensued, one who is maintaining the same interpretation that is evidenced by the other party's earlier words, and acts, can introduce them to support his contention.' We emphasize the conduct of one party to the contract is by no means conclusive evidence as to the meaning of the contract. It is relevant, however, to show the contract is reasonably susceptible to the meaning evidenced by that party's conduct." (*Southern California Edison Co., supra,* 37 Cal.App.4th at p. 851 (internal citations omitted).)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 689, pp. 622–623

## 819
## Interpretation—Reasonable Time

**If a contract does not state a specific time in which the parties are to meet the requirements of the contract, then the parties must meet them within a reasonable time. What is a reasonable time depends on the facts of each case, including the subject matter of the contract, the reasons each party entered into the contract, and the intentions of the parties at the time they entered the contract.**

### SOURCES AND AUTHORITY

- Civil Code section 1657 provides: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly—as, for example, if it consists in the payment of money only—it must be performed immediately upon the thing to be done being exactly ascertained."

- This rule of construction applies where the contract is silent as to the time of performance. (See *Palmquist v. Palmquist* (1963) 212 Cal.App.2d 322, 331.)

- The reasonableness of time for performance is a question of fact that depends on the circumstances of the particular case. (*Lyon v. Goss* (1942) 19 Cal.2d 659, 673; *Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 381.) These circumstances include the situation of the parties, the nature of the transaction, and the facts of the particular case. (*Sawday v. Vista Irrigation Dist.* (1966) 64 Cal.2d 833, 836.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 708–709

## 820
## Interpretation—Construction Against Drafter

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**In determining the meaning of a term of the contract, you must first consider all of the other instructions that I have given you. If, after considering these instructions, you still cannot agree on the meaning of the term, then you should interpret the contract term against [the party that drafted the term] [the party that caused the uncertainty].**

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### DIRECTIONS FOR USE

This instruction should be given only to a deadlocked jury, so as to avoid giving them this tool to resolve the case before they have truly exhausted the other avenues of approach.

### SOURCES AND AUTHORITY

- Civil Code section 1654 provides: "In case of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."

- Section 1654 states the general rule, but it does not operate to the exclusion of all other rules of contract interpretation. It is used only when none of the canons of construction succeed in dispelling the uncertainty. (*Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 596 ,disapproved on other grounds in *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376–377.)

- This rule is applied more strongly in the case of adhesion contracts. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 801.) It also applies with greater force when the person who prepared the writing is a lawyer. (*Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1370.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 698, pp. 631–632

## 821
## Existence of Condition Precedent Disputed

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**[Name of defendant] claims that the contract with [name of plaintiff] provides that [name of defendant] was not required to [insert duty] unless [insert condition precedent].**

**[Name of defendant] must prove that the parties agreed [insert condition precedent]. If [name of defendant] proves this, then [name of plaintiff] must prove that [insert condition precedent] occurred.**

**If [name of plaintiff] does not prove that [insert condition precedent] occurred, then [name of defendant] was not required to [insert duty].**

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### DIRECTIONS FOR USE

This instruction should only be given where both the existence and the occurrence of a condition precedent are contested. If only the occurrence of a condition precedent is contested, use instruction 822, *Occurrence of Agreed Condition Precedent.*

### SOURCES AND AUTHORITY

- Civil Code section 1434 provides: "An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event."

- Civil Code section 1436 provides: "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."

- "Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313.)

- "A condition is a fact, the happening or nonhappening of which creates (condition precedent) or extinguishes (condition subsequent) a duty on the part of the promisor. If the promisor makes an absolute or unconditional promise, he is bound to perform

when the time arrives; but if he makes a conditional promise, he binds himself to perform only if the condition precedent occurs, or is relieved from the duty if the condition subsequent occurs. The condition may be the happening of an event, or an act of a party." (1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 721, pp. 653–654.)

- "[W]here defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380.)

- "When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test." (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 (internal citations omitted).)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 771–772

## 822
## Occurrence of Agreed Condition Precedent

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**The parties agreed in their contract that [name of defendant] would not have to [insert duty] unless [insert condition precedent]. [Name of defendant] claims that [insert condition precedent] did not occur and that [name of defendant] did not have to [insert duty]. To overcome this claim, [name of plaintiff] must prove that [insert condition precedent] occurred.**

**If [name of plaintiff] does not prove that [insert condition precedent] occurred, then [name of defendant] was not required to [insert duty].**

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### DIRECTIONS FOR USE

If both the existence and the occurrence of a condition precedent are contested, use instruction 821, *Existence of Condition Precedent Disputed*.

### SOURCES AND AUTHORITY

- Civil Code section 1434 provides: "An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event."

- Civil Code section 1436 provides: "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."

- "Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313.)

- "A condition is a fact, the happening or nonhappening of which creates (condition precedent) or extinguishes (condition subsequent) a duty on the part of the promisor. If the promisor makes an absolute or unconditional promise, he is bound to perform when the time arrives; but if he makes a conditional promise, he binds himself to perform only if the condition precedent occurs, or is relieved from the duty if the condition subsequent occurs. The condition may be the happening of an event, or an

act of a party." (1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 721, pp. 653–654.)

- Section 224 of the Restatement Second of Contracts provides: "A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."

- Section 225 of the Restatement Second of Contracts provides:

  (1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.
  (2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.
  (3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.

- "[W]here defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380.)

- "When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test." (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 (internal citations omitted).)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 771–772

## 823
## Waiver of Condition Precedent

**[Name of plaintiff] and [name of defendant] agreed in their contract that [name of defendant] would not have to [insert duty] unless [insert condition precedent]. That condition did not occur. Therefore, [name of defendant] claims that [he/she] did not have to [insert duty].**

**To overcome this claim, [name of plaintiff] must prove that [name of defendant], by words or conduct, gave up [his/her/its] right to require [insert condition precedent] before having to [insert duty].**

### SOURCES AND AUTHORITY

- "Ordinarily, a plaintiff cannot recover on a contract without alleging and proving performance or prevention or waiver of performance of conditions precedent and willingness and ability to perform conditions concurrent." (*Roseleaf Corp. v. Radis* (1953) 122 Cal.App.2d 196, 206.)

- "A condition is waived when a promisor by his words or conduct justifies the promisee in believing that a conditional promise will be performed despite the failure to perform the condition, and the promisee relies upon the promisor's manifestations to his substantial detriment." (*Sosin v. Richardson* (1963) 210 Cal.App.2d 258, 264.)

- Waiver of a condition is a question of fact and not of law. (*Moss v. Minor Properties* (1968) 262 Cal.App.2d 847, 857.)

- Section 84 of the Restatement Second of Contracts provides:

  (1) Except as stated in Subsection (2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless
    (a) occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur; or

(b) uncertainty of the occurrence of the condition was an element of the risk assumed by the promisor.

(2) If such a promise is made before the time for the occurrence of the condition has expired and the condition is within the control of the promisee or a beneficiary, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if

(a) the notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and

(b) reinstatement of the requirement of the condition is not unjust because of a material change of position by the promisee or beneficiary; and

(c) the promise is not binding apart from the rule stated in Subsection (1).

## 824
## Anticipatory Breach

**A party can breach, or break, a contract before performance is required by clearly and positively indicating, by words or conduct, that he or she will not or cannot meet the requirements of the contract.**

**If [name of plaintiff] proves that [he/she/it] would have been able to fulfill the terms of the contract and that [name of defendant] clearly and positively indicated, by words or conduct, that [he/she/it] would not or could not meet the contract requirements, then [name of defendant] breached the contract.**

### SOURCES AND AUTHORITY

- Civil Code section 1440 provides: "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

- Courts have defined anticipatory breach as follows: "An anticipatory breach of contract occurs on the part of one of the parties to the instrument when he positively repudiates the contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof, or by voluntarily transferring to a third person the property rights which are essential to a substantial performance of the previous agreement, or by a voluntary act which renders substantial performance of the contract impossible or apparently impossible." *(C. A. Crane v. East Side Canal & Irrigation Co.* (1935) 6 Cal.App.2d 361, 367.)

- Anticipatory breach can be express or implied: "An express repudiation is a clear, positive, unequivocal refusal to perform; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible." (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137.)

- "In the event the promisor repudiates the contract before the time for his or her performance has arrived, the plaintiff has an election of remedies—he or she may 'treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he [or she] can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his [or her] remedies for actual breach if a breach does in fact occur at such time.' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 489.)

- Anticipatory breach can be used as an excuse for plaintiff's failure to substantially perform. (*Gold Mining & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 29.)

- "Although it is true that an anticipatory breach or repudiation of a contract by one party permits the other party to sue for damages without performing or offering to perform its own obligations, this does not mean damages can be recovered without evidence that, but for the defendant's breach, the plaintiff would have had the ability to perform." (*Esra Grae Corp. v. Flour Corp.* (1991) 613, 625 (internal citations omitted).)

- Section 253 of the Restatement Second of Contracts:

  (1) Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.
  (2) Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance.

<u>Secondary Sources</u>

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 805–812

## 825
## Affirmative Defenses—Unilateral Mistake of Fact

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**[Name of defendant] claims that there was no contract because [he/she] was mistaken about [insert description of mistake]. To succeed, [name of defendant] must prove all of the following:**

1. **That [name of plaintiff] knew [name of defendant] was mistaken about [insert description of mistake] and used that mistake to take advantage of [name of defendant];**

2. **That [name of defendant]'s mistake was not caused by [his/her/its] excessive carelessness; and**

3. **That [name of defendant] would not have agreed to enter into the contract if [he/she/it] had known about the mistake.**

**If you decide that [name of defendant] has proven all of the above, then no contract was created.**

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### DIRECTIONS FOR USE

If the mistake is one of law, this may not be a jury issue.

This instruction does not contain the requirement that the mistake be material to the contract because the materiality of a representation is a question of law. (*Merced County Mutual Fire Insurance Co. v. State of California* (1991) 233 Cal.App.3d 765, 772.) Accordingly, the judge would decide whether an alleged mistake was material, and that mistake would be inserted into this instruction.

### SOURCES AND AUTHORITY

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

- Civil Code section 1576 provides: "Mistake may be either of fact or law."

- Civil Code section 1577 provides the following definition of mistake of fact:

  > Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:
  > 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,
  > 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

- Civil Code section 1578 defines mistake of law:

  > Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:
  > 1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,
  > 2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

- "It is settled that to warrant a unilateral rescission of a contract because of mutual mistake, the mistake must relate to basic or material fact, not a collateral matter." (*Wood v. Kalbaugh* (1974) 39 Cal.App.3d 926, 932.)

- The following quotation explains how unilateral mistakes can be used as a defense: "A mistake need not be mutual. Unilateral mistake is ground for relief where the mistake is due to the fault of the other party or the other party knows or has reason to know of the mistake. … To rely on a unilateral mistake of fact, [the party] must demonstrate his mistake was not caused by his 'neglect of a legal duty.' Ordinary negligence does not constitute the neglect of a legal duty as that term is used in section 1577." (*Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1007–1008 (internal citations omitted).)

- To prevail on a unilateral mistake claim, the defendant must prove that the plaintiff knew that the defendant was mistaken and that plaintiff used that mistake to take advantage of the defendant: "Defendants contend that a material mistake of fact—namely, the defendants' belief that they would not be obligated to install a new roof

upon the residence—prevented contract formation. A unilateral mistake of fact may be the basis of relief. However, such a unilateral mistake may not invalidate a contract without a showing that the other party to the contract was aware of the mistaken belief and unfairly utilized that mistaken belief in a manner enabling him to take advantage of the other party." (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 944 (internal citations omitted).)

- "Failure to make reasonable inquiry to ascertain or effort to understand the meaning and content of the contract upon which one relies constitutes neglect of a legal duty such as will preclude recovery for unilateral mistake of fact." (*Wal-Noon Corporation v. Hill* (1975) 45 Cal.App.3d 605, 615.) However, "[o]rdinary negligence does not constitute the neglect of a legal duty as that term is used in section 1577." (*Architects & Contractors Estimating Service, Inc., supra,* 164 Cal.App.3d at p. 1008.)

- Neglect of legal duty has been equated with "gross negligence," which is defined as "the want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 365–381

## 826
## Affirmative Defenses—Bilateral Mistake

**[Name of defendant] claims that there was no contract because both parties were mistaken about [insert description of mistake]. To succeed, [name of defendant] must prove both of the following:**

1. **That both parties were mistaken about [insert description of mistake]; and**

2. **That [name of defendant] would not have agreed to enter into this contract if [he/she/it] had known about the mistake.**

**If you decide that [name of defendant] has proven both of the above, then no contract was created.**

### DIRECTIONS FOR USE

This instruction does not contain the requirement that the mistake be material to the contract because the materiality of a representation is a question of law. (*Merced County Mutual Fire Insurance Co. v. State of California* (1991) 233 Cal.App.3d 765, 772.) Accordingly, the judge would decide whether an alleged mistake was material, and that mistake would be inserted into this instruction.

If the mistake is one of law, this may not be a jury issue.

### SOURCES AND AUTHORITY

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

- Civil Code section 1576 provides: “Mistake may be either of fact or law.”

- Civil Code section 1577 provides the following definition of mistake of fact:

  Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:
  1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,
  2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

- Civil Code section 1578 defines mistake of law:

  Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:
  1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,
  2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

- Section 20(1) of the Restatement Second of Contracts provides:

  There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and
  (a) neither party knows or has reason to know the meaning attached by the other; or
  (b) each party knows or each party has reason to know the meaning attached by the other.

- A mistake of fact may be urged as a defense to an action upon a contract only if the mistake is material to the contract. (*Edwards v. Lang* (1961) 198 Cal.App.2d 5, 12.)

<u>Secondary Sources</u>

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 365–381

## 827
## Affirmative Defenses—Duress

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**[Name of defendant] claims that there was no contract because [his/her] consent was given under duress. To succeed, [name of defendant] must prove all of the following:**

1. **That [name of plaintiff] used a wrongful act or wrongful threat to pressure [name of defendant] into consenting to the contract;**

2. **That [name of defendant] was so afraid or intimidated by the wrongful act or wrongful threat that [he/she] did not have the free will to refuse to consent to the contract; and**

3. **That [name of defendant] would not have consented to the contract without the wrongful act or wrongful threat.**

**An act or a threat is wrongful if [insert relevant rule—e.g., what is threatened is a criminal act].**

**If you decide that [name of defendant] has proven all of the above, then no contract was created.**

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### SOURCES AND AUTHORITY

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

- Civil Code section 1569 provides that the following acts constitute duress:

    1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife;
    2. Unlawful detention of the property of any such person; or,

3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.

- Civil Code section 1570 provides:

  Menace consists in a threat:
  1. Of such duress as is specified in Subdivisions 1 and 3 of the last section;
  2. Of unlawful and violent injury to the person or property of any such person as is specified in the last section; or,
  3. Of injury to the character of any such person.

- "Menace" is considered to be duress: "Under the modern rule, ' "[d]uress, which includes whatever destroys one's free agency and constrains [her] to do what is against [her] will, may be exercised by threats, importunity or any species of mental coercion. It is shown where a party 'intentionally used threats or pressure to induce action or nonaction to the other party's detriment.' " ' The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing." (*In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 84 (citations and footnotes omitted.)

- "Duress envisions some unlawful action by a party by which one's consent is obtained through fear or threats." (*Keithley v. Civil Service Bd. of The City of Oakland* (1970) 11 Cal.App.3d 443, 450 (internal citations omitted).)

- Duress is found only where fear is intentionally used as a means of procuring consent: "[A]n action for duress and menace cannot be sustained when the voluntary action of the apprehensive party is induced by his speculation upon or anticipation of a future event suggested to him by the defendant but not threatened to induce his conduct. The issue in each instance is whether the defendant intentionally exerted an unlawful pressure on the injured party to deprive him of contractual volition and induce him to act to his own detriment." (*Goldstein v. Enoch* (1967) 248 Cal.App.2d 891, 894–895 (internal citations omitted).)

- It is wrongful to use the threat of criminal prosecution to obtain a consent: "California law is clear that an agreement obtained by threat of criminal prosecution constitutes menace and is unenforceable as against public policy." (*Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119, 127 (internal citations omitted).) However, a threat of legitimate civil action is not considered wrongful: "[T]he action or threat in duress or menace must be unlawful, and a threat

to take legal action is not unlawful unless the party making the threat knows the falsity of his claim." (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128.)

- Standard duress is evaluated under a subjective standard: "The question in each case is, was the person so acted upon by threats of the person claiming the benefit of the contract, for the purpose of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained? Hence, under this theory duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim." (*In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 744 (internal quotation marks and citation omitted.)

- The wrongful acts of a third party may constitute duress sufficient to allow rescission of a contract with a party, who, although not participating in those wrongful acts, had knowledge of the innocent party's position. (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 205–206.)

- It is a well-established rule that evidence relied on to establish a defense of duress must establish the fact with reasonable certainty by clear, cogent, and convincing evidence. (*Stevenson v. Stevenson* (1940) 36 Cal.App.2d 494, 500.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 416–419

## 828
## Affirmative Defenses—Economic Duress

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**[Name of defendant] claims that there was no contract because [his/her/its] consent was given under duress. To succeed, [name of defendant] must prove both of the following:**

1. **That [name of plaintiff] used a wrongful threat to pressure [name of defendant]'s consent to the contract; and**

2. **That a reasonable person in [name of defendant]'s position would have felt that he or she had no reasonable alternative except to consent to the contract.**

**A threat is wrongful if [insert relevant rule, e.g., what is threatened is a bad-faith breach of contract].**

**If you decide that [name of defendant] has proven both of the above, then no contract was created.**

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### SOURCES AND AUTHORITY

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

- The doctrine of economic duress has been described recently as follows: " 'As it has evolved to the present day, the economic duress doctrine is not limited by early statutory and judicial expressions requiring an unlawful act in the nature of a tort or a crime. Instead, the doctrine now may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure. The assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment may constitute a wrongful act for purposes of the economic duress

doctrine.'" (*Philippine Export And Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1077–1078 (internal citations omitted).)

- Economic duress is evaluated under an objective standard: "The doctrine of 'economic duress' can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract. The party subjected to the coercive act, and having no reasonable alternative, can then plead 'economic duress' to avoid the contract." (*Crosstalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644 (internal citation omitted).)

- The nonexistence of a "reasonable alternative" is a question of fact. (*Crosstalk Productions, Inc., supra,* 65 Cal.App.4th at p. 644.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 420–422

## 829
## Affirmative Defenses—Undue Influence

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**[Name of defendant] claims that no contract was created because [name of plaintiff] was unfairly pressured by [name of plaintiff] into consenting to the contract.**

**To succeed, [name of defendant] must prove both of the following:**

1. **That [name of plaintiff] used**

   **[a relationship of trust and confidence] [or]**

   **[ [name of defendant]'s weakness of mind] [or]**

   **[ [name of defendant']s needs or distress]**

   **to induce or pressure [name of defendant] into consenting to the contract; and**

2. **That [name of defendant] would not otherwise have consented to the contract.**

**If you decide that [name of defendant] has proven both of the above, then no contract was created.**

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### SOURCES AND AUTHORITY

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

- Civil Code section 1575 provides three circumstances that support a finding of undue influence:

    1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
    2. In taking an unfair advantage of another's weakness of mind; or,
    3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

- The question of undue influence is decided as a question of fact: "[D]irect evidence of undue influence is rarely obtainable and, thus the court is normally relegated to determination by inference from the totality of facts and circumstances. Indeed, there are no fixed definitions or inflexible formulas. Rather, we are concerned with whether from the entire context it appears that one's will was overborne and he was induced to do or forbear to do an act which he would not do, or would do, if left to act freely." (*Keithley v. Civil Service Bd. of the City of Oakland* (1970) 11 Cal.App.3d 443, 451 (internal citations omitted).)

- "In essence, undue influence consists of the use of excessive pressure by a dominant person over a servient person resulting in the apparent will of the servient person being in fact the will of the dominant person. The undue susceptibility to such overpersuasive influence may be the product of physical or emotional exhaustion or anguish which results in one's inability to act with unencumbered volition." (*Keithley, supra*, 11 Cal.App.3d at p. 451.)

- Whether or not the parties have a confidential relationship is a question of fact: "It is, of course, well settled that while the mere fact that a relationship is friendly and intimate does not necessarily amount to a confidential relationship, such relationship may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. It is likewise frequently emphasized that the existence of a confidential relationship presents a question of fact which, of necessity, may be determined only on a case by case basis." (*O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 153 (internal citations omitted).)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 423–428

## 830
## Affirmative Defenses—Fraud

**[Name of defendant] claims that no contract was created because [his/her/its] consent was obtained by fraud. To prove this claim, [name of defendant] must prove all of the following:**

1. **That [name of plaintiff] represented that [insert alleged fraudulent statement];**

2. **That [name of plaintiff] knew that the representation was not true;**

3. **That [name of plaintiff] made the representation to persuade [name of defendant] to agree to the contract;**

4. **That [name of defendant] reasonably relied on this representation; and**

5. **That [name of defendant] would not have entered into the contract if [he/she/it] had known that the representation was not true.**

**If you decide that [name of defendant] has proven all of the above, then no contract was created.**

### SOURCES AND AUTHORITY

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

- Civil Code section 1572 provides:

  > Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his

connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
3. The suppression of that which is true, by one having knowledge or belief of the fact;
4. A promise made without any intention of performing it; or,
5. Any other act fitted to deceive.

- Fraud can be found in making a misstatement of fact, as well as in the concealment of a fact: "Actual fraud involves conscious misrepresentation, or concealment, or non-disclosure of a material fact which induces the innocent party to enter the contract." (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128.)

- Fraud may be asserted as an affirmative defense: "One who has been induced to enter into a contract by false and fraudulent representations may rescind the contract; or he may affirm it, keeping what he has received under it, and maintain an action to recover damages he has sustained by reason of the fraud; or he may set up such damages as a complete or partial defense if sued on the contract by the other party." (*Grady v. Easley* (1941) 45 Cal.App.2d 632, 642.)

- "It is well established that a defrauded defendant may set up the fraud as a defense and, in fact, may even recoup his damages by counterclaim in an action brought by the guilty party to the contract. [Citations.] The right to avoid for fraud, however, is lost if the injured party, after acquiring knowledge of the fraud, manifests an intention to affirm the contract." (*Bowmer v. H. C. Louis, Inc.* (1966) 243 Cal.App.2d 501, 503.)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 392–415

## 831
## Affirmative Defenses—Waiver

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**[Name of defendant] claims that [he/she/it] did not have to [insert description of performance] because [name of plaintiff] gave up [his/her/its] right to have [name of defendant] perform [this/these] obligation[s]. This is called a "waiver."**

**To prove this claim, [name of defendant] must prove, by clear and convincing evidence, all of the following:**

1. **That [name of plaintiff] knew [name of defendant] was required to [insert description of performance]; and**

2. **That [name of plaintiff] freely and knowingly gave up [his/her/its] right to have [name of defendant] perform [this/these] obligation[s].**

**A waiver may be oral or written or may arise from conduct that shows that [name of plaintiff] gave up that right.**

**If [name of defendant] proves that [name of plaintiff] gave up [his/her] right to [name of defendant]'s performance of [insert description of performance], then [name of defendant] was not required to perform [this/these] obligation[s].**

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### DIRECTIONS FOR USE

This issue is decided under the "clear and convincing" standard of proof. See instruction 201, *More Likely True—Clear and Convincing Proof*

### SOURCES AND AUTHORITY

- "Waiver is the intentional relinquishment of a known right after knowledge of the facts." (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 572.)

- "Waiver … is a question of fact and not of law, hence the intention to commit a waiver must be clearly expressed." (*Moss v. Minor Properties, Inc.* (1968) 262 Cal.App.2d 847, 857.)

- When the injured party with knowledge of the breach continues to accept performance from the guilty party, such conduct may constitute a waiver of the breach. (*Kern Sunset Oil Co. v. Good Roads Oil Co*. (1931) 214 Cal. 435, 440–441.)

- There can be no waiver where the one against whom it is asserted has acted without full knowledge of the facts. It cannot be presumed, in the absence of such knowledge, that there was an intention to waive an existing right. (*Craig v. White* (1921) 187 Cal. 489, 498.)

- " 'Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts.' The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver'." (*City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107–108; *Florence Western Medical Clinic v. Bonta* (2000) 77 Cal.App.4th 493, 504.)

- The "clear and convincing" standard applies "particularly" to rights favored in the law; however, it does not apply exclusively to such favored rights. It is proper to instruct a jury that waiver must be proven by this higher standard of proof. *(DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe and Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61.)

## 832
## Affirmative Defenses—Novation

**[Name of defendant] claims that the original contract with [name of plaintiff] cannot be enforced because the parties substituted a new and different contract for the original.**

**To prove this claim, [name of defendant] must prove that all parties agreed, by words or conduct, to cancel the original contract and to substitute a new contract in its place.**

**If you decide that [name of defendant] has proven this, then the original contract is not enforceable.**

### DIRECTIONS FOR USE

If the contract in question is not the original contract, specify which contract it is instead of "original."

### SOURCES AND AUTHORITY

- Civil Code section 1530 provides: "Novation is the substitution of a new obligation for an existing one."

- Civil Code section 1531 provides:

  Novation is made:
  1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation;
  2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or,
  3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former.

- "A novation is a substitution, by agreement, of a new obligation for an existing one, with intent to extinguish the latter. A novation is subject to the general rules governing

contracts and requires an intent to discharge the old contract, a mutual assent, and a consideration." (*Klepper v. Hoover* (1971) 21 Cal.App.3d 460, 463.)

- Conduct may form the basis for a novation although there is no express writing or agreement. (*Silva v. Providence Hospital of Oakland* (1940) 14 Cal.2d 762, 773.)

- Novation is a question of fact, and the burden of proving it is upon the party asserting it. (*Alexander v. Angel* (1951) 37 Cal.2d 856, 860.)

- "When there is conflicting evidence the question whether the parties to an agreement entered into a modification or a novation is a question of fact." (*Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 980.)

- "The 'question whether a novation has taken place is always one of intention,' with the controlling factor being the intent of the obligee to effect a release of the original obligor on his obligation under the original agreement." (*Alexander, supra*, 37 Cal.2d at p. 860 (internal citations omitted).)

- "[I]n order for there to be a valid novation, it is necessary that the parties intend that the rights and obligations of the new contract be substituted for the terms and conditions of the old contract." (*Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457.)

- "While the evidence in support of a novation must be 'clear and convincing,' the 'whole question is one of fact and depends upon all the facts and circumstance of the particular case,' with the weight and sufficiency of the proof being matters for the determination of the trier of the facts under the general rules applicable to civil actions." (*Alexander, supra,* 37 Cal.2d at pp. 860–861 (internal citations omitted).)

Secondary Sources

- 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 906–908